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SITUS OF PROPERTY FOR PURPOSES OF INHERITANCE TAXATION.

The Supreme Court of the United States in a recent case has stirred up that old mud-puddle of the law—the question as to the situs of personal property for taxation purposes—and, instead of clarifying the cloudy waters, has only spread them over a wider area. Blackstone v. Miller, 23 Sup. Ct. Rep. 277. The court in this case held that the beneficiaries under the will of a non-resident cannot invoke the federal constitution to prevent the taxation, under the New York inheritance-tax law, of the transfer, under such will, of the debts due decedent by its citizens, because the entire inheritance is taxable in the state of the decedent's domicile. This decision, therefore, practically decides that where a person who is so unfortunate as to die in one state owning property in another, not only may that property be taxed as *property* in both states, which is the extent to which the rule had gone heretofore, but that it is also subject to the burden of a succession tax in the state where situated as well as in the state of the domicile and where the appraisement is made. This is legalized injustice, but the mouth of the supreme court has spoken it.

Despite what the court may say in disparagement of the maxim, *mobilia sequuntur personam*, that maxim has done much and would do still more toward reducing much of the inequitable results of double taxation, were the courts to give it that respect which the courts of England and Pennsylvania have given it. The courts of this country, however, have made the maxim a plaything, using it when it served their pleasure and tossing it away when it stood in the way of their own state's selfish aggrandizement. Thus, in New York the courts will insist on the maxim as high authority for taxing the succession of property wherever situated belonging to a resident decedent (Estate of Swift, 137 N. Y. 77, 18 L. R. A. 709), but when a non-resident dies unfortunate enough to have left any kind of personalty, tangible or intangible, in the state of New York, the courts of that state hasten to drop the maxim to which we have referred as if it were a live coal and claim that sometimes it is quite expedient to drop the maxim anyway, the court making the amazing declaration that "the legislature intended to repeal the maxim *mobilia personam sequuntur* so far as it was an obstacle, and to leave it unchanged, so far as it was an aid, to the imposition of a transfer tax upon all property in any respect subject to the laws of that state." *In re* Whiting's Estate, 150 N. Y. 27, 34 L. R. A. 232. See also State v. Dalrymple, 70 Md, 294, 17 Atl. Rep. 82; *Re* Romaine, 127 N. Y. 80, 27 N. E. Rep. 759. But even in New York this utter disregard of the maxim cannot always be indulged. Thus, notwithstanding the rule announced in *Re* Romaine, 127 N. Y. 80, the fiction has been applied to stocks and bonds of foreign corporations within the state belonging to a deceased non-resident, the court holding that, there being no intention in the act of 1887 to tax these securities, the fiction prevailed and they were presumed to be at the domicile of the owner. *In re* James, 144 N. Y. 6, 38 N. E. Rep. 961. The court in this case seems to be cherishing a deeper appreciation of the principles of comity and of justice when it says, on the question of double taxation, that its result is one which the courts should incline to avoid whenever it is possible to do so.

In England and Pennsylvania a more logical rule is maintained, Dos Passos to the contrary notwithstanding. (See Dos Passos on Inheritance Tax Law, § 47, criticising the English and Pennsylvania authorities.) After much discussion and wavering between national cupidity and selfishness on the one hand and a regard for principles of comity and the integrity of the rules of law and its maxims on the other, the English courts took the latter alternative and held that the Legacy Tax did not apply to inheritances and successions in foreign jurisdictions, although personal property belonging to the non-resident decedent was situated within the jurisdiction. Thompson v. Advocate General, 11 Clark & F., 1. So also in Pennsylvania: Orcutt's Appeal, 97 Pa. St. 185. This was also originally held in New York. *In re* Enston's Will, 113 N. Y. 179, 21 N. E. Rep. 87. In Coleman's Estate, 159 Pa. St. 231, 28 Atl. Rep. 137, the court says: "The rule that personal property follows the domicile is internationally recognized and observed, as being founded in

convenience, and a disregard of it here may react to the prejudice of our own citizens." This is an expression worthy of a great court, and is an application of the golden rule (of which comity is but an expression), which is quite refreshing in these days of gross selfishness.

We may be pardoned the presumption of enunciating a theory of our own in this class of cases which, while impliedly referred to and denied in the principal case, has not in any case been extensively argued. There is an inherent distinction existing between inheritance taxation and general property taxation that makes useless altogether the application of the maxim *mobilia sequuntur personam* to the former. "Inheritance taxes," says Dos Passos, "are in principle primarily imposed, not upon property, but upon the succession or devolution of property by will or intestate law and this would seem to be the only theory upon which such a tax can be properly maintained." Dos Passos on Inheritance Tax Law, p. 192. The learned author, however, after reaching this advanced position fails to carry his argument to its logical conclusion but turns back to his original statement that, notwithstanding this may be so, and that its result is double taxation, there is no constitutional objection to double taxation.

Let us pursue our discussion from the quoted premise of our learned author. If it is the devolution of property and not the property itself that is the subject of taxation under the inheritance tax, the pivotal question is, as Mr. Dos Passos suggests: Under what law is the succession had? Certainly at the domicile of the decedent or where the will is probated or letters of administration granted. The law of that jurisdiction, therefore, as it controls the devolution of the property, controls also all laws appertaining thereto, as a tax upon such devolution or succession. The fact that the property which passes under a foreign administration has in fact an actual situs in another jurisdiction does not give the latter jurisdiction any right to tax its succession or devolution. It may have, and there is good reason why it should have, the right to impose a property tax, because, by the property's situs in the jurisdiction, it has claimed and received the latter's protection for which it might be justly expected to be taxed. But for a state to go beyond its boundaries and tax, not the property which it has in its possession and which it has a right to tax, but its devolution under the laws of another state is more than double taxation, it is something a state has no right to do, and is void under the United States constitution as depriving a person of property without due process of law.

It may be objected: Is there anything unconstitutional in double taxation? It has been held that there is not, but these decisions refer to cases in which the taxing power was *legitimately* exercised in both cases. Where, however, the taxing power is not legitimately exercised, then, double taxation or not, its exereise is contrary to the constitution. State Tax on Foreign Held Bonds, 15 Wall. (U. S.) 300. Inheritance taxation, therefore, can apply only to property which passes under the probate or intestate laws of the state seeking to impose the tax, and a state's attempt to tax the devolution of property in another state is a gross and unwarranted extension of its jurisdiction.

NOTES OF IMPORTANT DECISIONS.

ATTORNEY AND CLIENT — VALIDITY OF CONTRACT WITH THIRD PERSON FOR THE PROCUREMENT OF CLIENTS AND WITNESSES—A certain class of lawyers who look upon their profession more as a business than a profession can see nothing wrong in a contract with a layman by which the latter engages to furnish him with causes of action and evidence to support them in consideration of a certain percentage of the attorney's fee. Elsewhere in the CENTRAL LAW JOURNAL we have said that such practice was cause for disbarring the attorney, 56 Cent. L. J. 390. Be that as it may, however, a recent case holds that such a contract is absolutely void and unenforceable. Langdon v. Conlin, 93 N. W. Rep. 388. In this case, the Supreme Court of Nebraska held that a contract between an attorney at law and one who is not such an attorney, by which the latter agrees to procure the employment of the former by third person for the prosecution of suits in courts of record, and also to assist in looking after and procuring witnesses whose testimony is to be used in the cases, in consideration of a share of the fees which the attorney shall receive for his services, is against public policy and void.

In rendering its decision the court voiced the following sentiments: "It is apparent that it is the policy of the legislature to fix a high standard of professional ethics to govern the conduct of attorneys in their relations with clients and courts, and to protect litigants and courts of justice from the imposition of shysters, charlatans, and mountebanks. It seems to us that the contract in issue is but a thinly veiled subterfuge by which

the plaintiff, who, it is conceded, was not a member of the bar, and who had never complied with any of the provisions of chapter 7, *supra*, for the purpose of authorizing him to engage in the practice of law, undertook to break into the conduct of proceedings in a court of record, to which he was not a party, by attempting to form a limited and silent partnership with one who had complied with the provisions of the law, and was entitled to the emoluments of the profession." The decision in this case is supported by the authorities: Alpers v. Hunt, 86 Cal. 78, 24 Pac. Rep. 846, 9 L. R. A. 483, 21 Am. St. Rep. 17; Burt v. Place, 6 Cow. (N. Y.) 431; Munday v. Whisenhunt, 90 N. C. 458; Lyon v. Hussey, 82 Hun, 15.

SHERIFFS AND CONSTABLES—LIABILITY OF SHERIFF FOR ACT OF DEPUTY IN BREAKING INTO A PRIVATE DWELLNG TO SERVE PROCESS.—Every man's house is his castle and no man, whether he is an officer of the law or not has a right to force his way into it without invitation or without express warrant to do so from some authority competent to give it in extreme cases. This ancient rule of the common law, has sometimes been so badly neglected as to encourage its violation, especially on the part of officers of the law charged with the duty of serving process, who in their perhaps laudable desire to fully and faithfully perform their many times unpleasant duty, will often disregard and trample under foot some of the most sacred rights of the citizen under the constitution. A pertinent instance of this dangerous and growing practice is to be found in the case of Foley v. Martin, 70 Pac. Rep. 165 in which the Supreme Court of California severely condemned the action of two deputy sheriffs in breaking into the house of plaintiff in order to serve him with civil process, and held the sheriff himself liable in damages, both actual and exemplary, for such acts of his deputies. The facts in this case showed that the two offending deputies, being unable to gain an entrance to plaintiff's house to serve a summons in a civil action, the doors leading into the house being locked and bolted, opened a door leading into a closet built on the porch, from which they gained entrance into the house through a swinging window by means of a stepladder, and broke open the door of plaintiff's room, and there served the process on plaintiff while he was confined in bed from paralysis.

In sustaining the decision of the lower court, Harrison, J., speaking for the Supreme Court of California, said: "The proposition is elementary that a sheriff has no authority to break into a dwelling house for the service of process in a civil action. Semayne's Case, 5 Coke, 91; 1 Smith, Lead. Cas. p. *114; Crocker, Sheriffs, §§ 313–317, 350; Snydacker v. Brosse, 51 Ill. 357, 99 Am. Dec. 551; State v. Beckner, 132 Ind. 371, 31 N. E. Rep. 950, 32 Am. St. Rep. 257; Curtis v. Hubbard, 1 Hill, 336, affirmed 4 Hill, 437, 40 Am. Dec. 292. Mr Crocker says in reference to the service of summons (section 350): 'In making the service the officer has no more power than any individual. He may enter the defendant's house in the day or night time to make the service peaceably, if he can, but he has no right to enter forcibly, or against the owner's wishes.' In Freem. Ex'ns, § 256, the author says: 'It is not necessary, in order to entitle the defendant to protect his dwelling from intrusion, that the door be either shut or locked, if he, being present, shows a desire to exclude the officer by closing the door against him.' The evidence before the court fully shows that the officer violated these rules, and sustains the above finding of the court. Entry through the window was itself a breaking into the house. 'The outer door was shut. That was itself a prohibition.' Curtis v. Hubbard, *supra*."

IS THE PROCEEDING FOR PUNISHMENT OF THE VIOLATION OF AN INJUNCTION, CIVIL OR CRIMINAL?—This question is presented by the case of the Naturita Canal and Reservoir Company v. The People, 70 Pac. Rep. 691, decided in the Supreme Court of Colorado. The Naturita Company, it appears, was fined for violating an injunction, and prosecuted a writ of error. The supreme court declared that the contempt was "purely civil in character," that by statutory provisions no writ of error lies from the supreme court unless the final judgment exceeds twenty-five hundred dollars, or the matter in dispute involves a franchise or a freehold, or unless some provisions of the federal or state constitution is necessary to the determination of the cause.

As none of these conditions were presented, the court, rejecting the authority of its own previous decision in Shore v. The People, 26 Colo. 484, 516, held that it had no jurisdiction and dismissed the writ of error.

Is it a sound proposition that the judgment of a court imposing a fine for the contumacious disobedience of its process, or the proceeding in which this judgment was rendered, is "purely civil in character?" Is there any contempt of the courts that is not an offense against the state? However much the individual may be interested in the enforcement of the process which is issued in his behalf, however serious the injury which the disobedience of that process may occasion to him, is not, in the eye of the law, the public wrong and injury occasioned by the disobedience of the mandate of the court appointed for the punishment of crime, the adjudication of private rights and the redress of private injuries, in the authority and dignity of which every citizen has an interest, of much more serious character? It seems to us no one can fail to answer this query in the affirmative; and this seems to accord with the great weight of authority. In Commonwealth v. Feeley, 2 Va. Cas. 1, preventing a witness from attending court was held to be a criminal offense. The case in which the witness was subpœnaed appears to have been a civil action. In Baltimore

and Ohio Company v. The City of Wheeling, 13 Gratt. 40, a proceeding against a railroad company for the violation of an injunction, the court say: "A contempt of court is in the nature of a criminal proceeding." In Williamson's Case, 26 Pa. St. 9, Williamson had been imprisoned by the District Court of the United States for disobeying a writ of *habeas corpus* issued to enable a master to recover his runaway slaves, and applied to the supreme court to be enlarged on the ground of the suggested illegality of the commitment.

Black J. says: "It must be remembered that contempt of court is a specific criminal offense. It is punished by indictment and sometimes in a summary proceeding, as it was in this case. In either mode of trial the adjudication against the offender is a conviction and the commitment in consequence, is execution. This is well settled and has never been denied." In Crook v. The People, 16 Ill. 534, it was held that a proceeding for the violation of an injunction, "when the charge is made, becomes a distinct proceeding on behalf of the people." In First Congregational Church v. The City of Muscatine, 2 Iowa, 71, the court say, speaking of a proceeding to punish the violation of an injunction: "The proceedings to punish a contempt of process, though based upon, is merely incidental to, and to a great extent independent of the original proceedings. The contempt may be punished whether the injunction be regularly issued or not, and the court will not look into the merits of the cause in which the injunction issued. The proceeding is in its nature criminal,—to punish disobedience to civil authority, whereby the civil arm is weakened, and the majesty of the law overthrown." In Cartwright's Case, 114 Mass. 232, the following language is used: "An application for an attachment for contempt is to be made and filed in the original cause, after the attachment is issued, the proceedings are distinct, and are criminal in their nature." Folger v. Hoagland, 5 Johns. 235; *Ex parte* Kearney, 7 Wheat. 38; Durant v. Supervisors, Woolw. 377; Winslow v. Nayson, 113 Mass. 411; McDermott v. Cleary, 107 Mass. 501.

In the Supreme Court of California, although in that jurisdiction the proceedings to punish a contempt of civil process is had in the same cause or proceeding out of which it arose, it has always been held that the contempt is a *quasi* criminal offense. *In re* Filki, 80 Cal. 201.

In *Ex parte* Gould, 99 Cal. 360, it was held that one accused of the violation of an injunction was entitled to the protection of the provision of the statute, that no person shall be compelled to be a witness against himself "in any criminal case," and the court cites with approval the language of Mr. Justice Black in Williamson's case. So, in *Ex parte* Hollis, 59 Cal. 408, it was said that "To judge a party guilty of contempt of court is to judge him guilty of a specific criminal offense. The imposition of a fine is a judgment in a criminal case."

In Haight v. Lucia, 36 Wis. 360, the court say: "A proceeding to punish the violation of an injunction is no part of the process in the civil action, but is in the nature of a criminal prosecution. Its purpose is not to indemnify the plaintiff for any damages he may have sustained by reason of such misconduct, but to vindicate the dignity and authority of the court. It is a special proceeding, criminal in character, in which the state is the real prosecutor."

And the Code of Colorado, Laws 1887, p. 188, which was adopted from California, seems inevitably to warrant the view of the California Court. Disobedience of any lawful writ is declared to be a contempt. An affidavit is required of the facts constituting the contempt and a warrant of attachment is thereupon issued. The accused may be let to bail with sureties. The charge is then investigated by the court. If the party accused is found guilty, "a fine may be imposed upon him, not exceeding five thousand dollars," or he may be imprisoned and the judgment is conclusive and final.

By another provision of the statute, all fines are paid into the county treasury, where no other provision is made; fines imposed for the violation of injunction or other like writs go to the school funds. Gen. Laws Colo., 1883, p. 902.

With what propriety, therefore, can it be said, that a proceeding which begins with a sworn accusation, followed by a warrant of arrest and ends with a judgment of conviction and a fine or imprisonment, every dollar of which fine goes to the public, and not to the party injured by the contempt, is "purely civil in character."

THE OFFICE WORK OF AN ATTORNEY.

The practice of the law changes no less than the law itself. The modern development of legal science in new and varied fields has created the specialist. Much of the work formerly done by attorneys, is now performed by banks, by trust, title, guaranty and real estate companies. Delays and expenses of litigation often dictate a policy of compromise, and clients seek to avoid litigation, rather than hazard their fortunes upon a law suit. With these changes, the office lawyer and counsellor acquires increased importance. How he can render himself most successful is, therefore, a question of no small moment.

He will create a favorable impression upon those who call at his chambers, by proving himself a man of orderly habits. Hence, at the first glance around his rooms, the visitor will observe law books arranged with regularity, documents laid in neat piles, no confusion on table or desk, no scrap of paper upon the floor. The apartments will be light, his furniture and appointments clean and substantial; for the notion that lawyers' offices, of necessity, are somber, dusty and ill kept, has long since become obsolete. In preparing his legal papers, he will strive to establish a reputation for neatness, not only in the form of

his documents but as well in the mode of expressing his thoughts.

To assist him in methodical labor, he will keep a memorandum calendar of appointments and the days on which pleadings must be filed or opinions furnished. He will complete his task by the time designated, even though it involve, for him, the loss of sleep, food and rest. He will meet his appointments by presenting himself upon the minute, or before, but never one second late. Only by observing such details, apparently trifling, will he become known as a reliable man of business.

He will consult his own convenience by docketing every matter which comes into his office, indexing it in the names of all the parties interested. Ample space will be devoted upon the page to a statement of the nature of the cause, names of witnesses and litigants, with their addresses. Opposite these entries, he will note each successive step taken, so that, at any time, he can readily see how a given matter stands and what have been his professional labors therein.

No business letter will lie unanswered for a day, but he will at once obtain the information necessary for returning a satisfactory reply, and relieve himself from anxiety and despair by attending strictly to his correspondence. Nothing will more certainly ingratiate him with his clients, than a full prompt and intelligent response to letters; for of most lawyers it may be asserted, as Napoleon remarked of the generals whom he had defeated, "they do not know the value of *time*."

Clients desire to be kept informed concerning the progress of their business. Accordingly, the successful attorney will report frequently to his employer and apprise him of each new phase of the case. This will produce the additional effect of stimulating counsel to action, since he will hesitate to report, again and again to his client, the same unaltered condition of the cause.

In delivering legal opinions, our counsellor will write with a view of enabling laymen to comprehend their meaning. They will be clear, explicit and usually supported by cited authorities. In his preparation of briefs, he will follow a close, logical outline, not arguing the law in one paragraph, the facts in the next, returning to the law in a third and discussing both in a fourth, but he will state first the nature of the cause; then the issues; next, the decision upon the issues; fourth, the errors or cross errors assigned; fifth, so much of the record as fully presents every error to be discussed; and lastly the argument, in order, of each separate point relied upon. "By their fruits you shall know them," and the finest products of of a lawyer's office should be his briefs.

The attorney, however learned, will constantly discipline himself by study. New problems constantly arise, new solutions of old problems are frequently suggested. If the counsellor confines his reading to the text-books of the past century, he will become a legal antiquarian, not a practitioner. He must read the current reports of his own state as rapidly as they appear, keeping his mind open and hospitable to any new and interesting points of law recently decided. As a constant companion, he will carry with him a pocket note book, containing entries of every novel, striking or mooted question which he perceives has lately been settled, with the volume and page where it is found. These notes he reads and rereads during leisure moments, especially those which vary from his own preconceived ideas of the law. As a progressive lawyer, he will keep himself abreast of the times by scanning some prominent legal journal, dealing with contemporaneous cases, and discussing important legal topics.

His text-books and statutes will be annotated with late cases and references to the legal periodicals he has examined. At intervals he will reread some familiar text-book, noting the doctrines which he has overlooked in former perusals, and correcting his own or the author's views in the light of modern decisions.

In all of his labors, he should observe three cardinal requisites: method, concentration and enthusiasm. Without the first, his efforts will be spasmodic and abortive. He will feel that he is accomplishing little, and discouragement and listlessness will sap his strength. But where his work proceeds according to system, it acquires a momentum carrying it on to its consummation, while the energy expended is proportionately conserved. To the task in hand the lawyer must bend his attention with an iron determination. For him, nothing in the world is so important as the work before him. Into it, he must put his whole being. With this strain of the mind must co-operate an enthusiasm for the undertaking which is proof against interruptions and undaunted by difficulties. It must buoy his spirit and quicken his wit, until he beholds, lying completed before him the task from which he shrank, but which has yielded to his perseverance. Never for one instant, will he indulge the fatal desire to perform, first, that which is easy and agreeable, leaving the stern, hard problems to await a more convenient season. Intricate or easy, repellant or attractive, each will be solved as it presents itself, zealously, systematically and with unwavering purpose.

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HABEAS CORPUS PROCEEDINGS FOR THE RELEASE OF INFANTS.

In most cases where *habeas corpus* proceedings are instituted to obtain the release of an infant, redress is sought for the alleged wrongs of a third person. The infant who is said to be deprived of his liberty is not usually the

actor, nor the one chiefly interested. In this respect the proceedings differ fundamentally from those brought to procure the discharge from confinement of adults. With occasional exceptions, applications for a writ to inquire into the cause of detention of an adult are made by the person detained. The exceptions occur when from any cause the prisoner cannot be reached to obtain an affidavit and signature to the application. And in all such cases the prisoner is the real party in interest. But *habeas corpus* statutes, from the time of Charles II., have conferred authority upon third persons to make applications for the writ in order to procure the discharge of persons said to be unjustly or illegally confined. This is upon the ground that society has an interest in the welfare of every individual and in seeing that the laws respecting the liberties of citizens shall be obeyed. In making the application such third person really acts for the general welfare more than for the individual whose release he seeks, though the immediate benefit to the prisoner may be the prompting cause of the application. But in such cases the third person must, in his application, set forth fully the cause of the detention and the reasons why he makes it, instead of the prisoner.

It is not my purpose in this article to cover the law of *habeas corpus* as it affects adults. I propose to consider some of the questions involved when the writ is invoked on behalf of infants, especially those of tender years, who often become the subject of controversy between conflicting claimants to their custody. A prominent and important feature of the law of this branch of the subject is the interest in such controversy of the adults, as parents, guardians, masters, relatives, etc., who make the applications and who are the principal actors.

1. What the Application Must Show.—This is regulated mainly by statute, state and federal. As infants cannot act for themselves, the application is always presented by some adult on their behalf, and it must show: (*a*) Infancy of the person detained. (*b*) Relation of applicant to the prisoner. (*c*) Where and by whom the infant is detained and the specific grounds of the detention. And the courts require that the grounds of the detention shall be set forth fully; that facts, not conclusions, shall be stated.[1] On this point the Supreme Court of Nebraska, says: "The petition must set forth the facts constituting the illegal detention. It is not sufficient to state that the petitioner is restrained of his liberty, as that is a conclusion, but it must be made to appear in what the illegal restraint consists. *Ex parte* Nye, 8 Kan. 99,"[2] and the application must show in what respect the detention is illegal.[3] And in the case of a child, where the controversy is over its custody, the application must show that it will be for the interest of the child to take it from the respondent and give it into the keeping of the relator.[4] Upon the question of presenting the material facts in the application, Chief Justice Marshall, in the Watkins case (2 Pet. 201), said: "The writ ought not to be granted if the court is satisfied that the prisoner would be remanded." The rule is that the writ does not issue as a writ of right, but that a full and complete showing must be made of the facts so the court can see from the application that the person ought to be brought before the court for a hearing.[5] In the Hobhouse case (3 B. & Ald. 420), the court said: "It is urged that this is a writ of right, and therefore grantable without inquiry. But it is not a writ of right in that narrow and technical sense; if it were, the issuing of it would be a ministerial act and the party claiming it might go to the clerk and sue it out as he may a claim for land or money. Nor does this limit restrain the full and beneficial operation of the writ, so essential to the protection of personal liberty. The same court must decide whether the imprisonment complained of is illegal; and whether the inquiry is had in the first instance on the application or subsequently on the return to the writ, or partly on the one and

[1] Hurd on Hab. Corp. p. 211 (2d Ed.); In Matter of Winder, 2 Clif. 89; 3 Block. 132; Bushel's Case, 2 John. 13; 3 Bulst. 27; 2 Roll Rep. 138; Ford v. Graham 10 C. B. 369; Max. Pl. & Pr. 566-7 (6th Ed.).

[2] State v. Ensign, 13 Neb. 250, 13 N. W. Rep. 216; also, *In re* Balcom, 12 Neb. 316, 11 N. W. Rep. 312.

[3] *Ex parte* Maule, 19 Neb. 273, 27 N. W. Rep. 119; Rhea v. State (Neb.), 84 N. W. Rep. 414; 9 Ency. Pl. & Pr. 1019 *et seq.*, and 1022.

[4] Heather Children's Case, 50 Mich. 61, 15 N. W. Rep. 487.

[5] *In re* Jordan (D. C.), 49 Fed. Rep. 238; *In re* King (C. C.), 51 Fed. Rep. 434; *Ex parte* Campbell, 20 Ala. 89; Hoskins v. Baxter, 64 Minn. 226, 66 N. W. Rep 969; Jordan v. State, 14 Tex. 436.

partly on the other; it must depend upon the same facts and principles and be governed by the same rule of law."[6] (*d*) Where the detention is by virtue of a warrant or other process, a copy thereof shall be annexed or a sufficient showing made that a copy cannot be obtained.

2. *Who May Obtain the Writ.*—In most of the Code states the rule prevails that all actions and proceedings (barring certain exceptions of which *habeas corpus* is not one) must be brought by the real party in interest. If this rule shall be applied to *habeas corpus* cases, then a controversy over the custody of a child cannot be maintained by a person who is not asking for the custody for himself, but for some other person. Doubtless a third and disinterested person could act as the next friend of the infant who is at least fourteen years of age and thus entitled to choose a guardian, and so be enabled to maintain the proceeding on behalf of the infant. But in reality it would then be a proceeding by the infant and not by the third person. And in such case there could not very well be a controversy over the custody of the child. That is, there would be but one claimant for the child, viz.: the respondent, and if the application proved successful the child would simply be released.

Many of the statutes are substantially like the Nebraska statutes, viz.: "If any person (with certain exceptions) now is or shall be unlawfully deprived of his liberty, and shall make application either by himself or herself, or by any person on his or her behalf," etc. It might seem clear from this that a stranger, having no interest in the person detained, could not maintain an application for the writ in his own name and without disclosing that it was on behalf of the one restrained of his liberty. Yet the courts have been called upon to decide this question.[7] And in one case of an application for the release of a child, the rule was squarely laid down that the writ will not be granted upon the application of a stranger who has no interest in the child.[8] Many cases are cited in 15 Am. & Eng. Ency. of Law, p. 182 *et seq.* and in 25 Cent. Dig., p. 900 *et seq.*, but in all these cases the applicant shows the nature of his interest. In many of these cases the applications are made for the writ for children by parents or guardians or masters of apprentices or slaves, or some person having a special relation to the child restrained. Indeed in the cases reported the applicant for the writ for a child, and especially a young child, so generally stands upon his own personal interest in the controversy, by reason of his relation to the child, that the rule seems established, although not expressly declared in many cases, that when such interest is not shown in the application the courts will refuse the writ.

Of course in such cases, in the absence of a valid contract or guardianship right, the applicant must also allege and prove that the interest of the child will be best subserved by changing its custody and placing it in the keeping of the relator. Yet in cases brought by guardians to recover wards, and masters to recover apprentices or slaves, the main question always is the legal right of claimant to control the person of the child, or the one said to be restrained. When the application is made by a guardian the question is whether the child has been lawfully committed to his care and whether his right to control the child still continues. Masters of apprentices must prove their contract and right to the services of the infant sought to be released. Masters of slaves must prove their ownership as a plaintiff in replevin proves ownership of a horse, or that he possesses some special interest in the the slave that carries with it the right of possession, and it matters not if the one detained be an infant or of age. But without taking space to elaborate these questions in all their numerous branches we will consider:

3. *The Writ in Cases of Parent Seeking to Recover Child From a Stranger.*—By the

[6] Also, *Ex parte* Kearney, 7 Wheat. 38; *Ex parte* Milligan, 4 Wall. 2; *Ex parte* Lange, 18 Wall. 163; *Ex parte* Vallandingham, 1 Wall. 243; People v. Manly, 2 How. Pr. 61.

[7] *Ex parte* Child, 29 Eng. Law & Eq. 259. In this case, Jervis, C. J., said: "A mere stranger has no right to come to the court and ask that a party who makes no affidavit and who is not suggested to be so coerced as to be incapable of making one, may be brought up by *habeas corpus* to be discharged from restraint. For anything that appears, Capt. Child may be very well content to remain where he is."

See also, Rex v. Clark, 3 Burr, 1363, 1 Cush. 385; People v. Mercein, 3 Hill, 399, which was an application for the custody of a child; 9 Ency. Pl. & Pr. 1016 *et seq.*; *In re* Curd, 11 Ohio Weekly Law Bulletin; Commonwealth v. Kellacky, 3 Brewst. 565.

[8] *In re* Poole, 2 McArthur (D. C.), 29 Am. Rep. 628.

term "stranger" is meant a person who is not, under the circumstances of the case, the natural guardian of the child, or designated by statute to take the place of the natural guardian under certain circumstances; as, for instance, in case of any unavoidable or unfortunate separation of the parent and child. Whenever the parent seeks to recover a child from any third person, the approved remedy is *habeas corpus*.[9] One parent may maintain proceedings for the writ against the other parent, when the right to the control and custody of children is in dispute.[10] In such cases the real question involved is not: Shall the children be released from the restraint imposed by respondent? but: Who shall have the care, custody and control of them? In this respect the function of the writ has become radically changed in modern times. In Hurd on *Habeas Corpus*,[11] we have the function of the writ defined: "The writ of *habeas corpus* is that legal process which is employed for the summary vindication of the right of personal liberty when illegally restrained. * * * Employed to vindicate the right of personal liberty by whatever power infringed it became inseparably associated with that right, and in proportion as the right was valued, so was the writ by which it was defended."

Thus before Magna Charta, and how long before seems not now discoverable, the writ was used simply and solely to protect the liberty of the citizen. Greatly fortified and supported by the declarations of Magna Charta in behalf of human liberty, the writ became more popular and effectual in the protection of the citizen. But in time gross abuses in the use of the writ by the courts grew up, and in 1679 the Act of Charles II. was passed. The declared purpose of the Act was "the more speedy relief of all persons imprisoned for any such criminal matters."

So in administering the writ the English courts generally refuse to do more than release the person unlawfully restrained of his liberty; as in cases of masters employing the writ to recover their apprentices.[12] But in this country the courts have inclined to go farther, and in an early case in Pennsylvania, delivered the apprentice to the master.[13]

But there must, in fact, be an illegal restraint of the person who is the subject of the application, or the writ will not be issued. It is not enough for the parent or guardian or master to claim the right to the care, custody and keeping of the infant; he must also show that the infant is restrained of his liberty. In State v. Cheeseman[14] this point was squarely considered and the court, *inter alia*, in discussing the purpose of *habeas corpus*, said: "It is for the relief of the prisoner only. It is to inquire why the liberty of the citizen is restrained. This, then, is its only object; to relieve from restraint and imprisonment. Whenever there is no imprisonment, there is no ground for the writ of *habeas corpus*. And I apprehend no case can be cited where this writ is either used to determine a question of property or the conflicting rights to the possession of a person; it looks to another object altogether."[15]

Thus much as to the true function of the writ. But we find in later cases, especially in the United States, that generally the courts do determine the custody of infants in *habeas corpus* cases. As a basis for taking jurisdiction to determine the custody of the child, it seems that when it appears from the application that the child is in the control of one who is not entitled to the custody, this constitutes a restraint sufficient to support the proceeding. And then the court, upon the hearing, inquires into the question of the rights of the parties to the care and custody of the child and makes an order accordingly. Upon finding that the infant is improperly restrained, the court sets it free; and if the child is of tender years and, therefore, unable to make an intelligent and wise choice of a guardian, the court will award it to the cus-

[9] 12 Am. & Eng. Ency. Law, 182 (2d Ed.); *In re* Barry, 42 Fed. Rep. 113, 25 Cent. Dig. (C. C.), 908-10.

[10] *Id.* Also, see Nickols v. Giles, 2 Root (Conn.), 461; Miller v. Miller, 38 Fla. 227, 36 Am. St. Rep. 166; Lindsay v. Lindsay, 14 Ga. 657; State v. Smith, 6 Me. 462, 20 Am. Dec. 324; Com. v. Briggs, 16 Pick. 203; McShan v. McShan, 56 Miss. 413; Davis v. Davis, 75 N. Y. 221; Com. v. Sage, 160 Pa. St.

[11] P. 143-4.

[12] *Ex parte* Landsdown, 5 East, 38; Rex v. Reynolds 6 T. R. 497; Rex v. Edwards, 7 T. R. 741.

[13] 1 Bro. Rep. 277; and see The People v. Pillow, 1 Sandf. Sup. Ct. 672.

[14] 2 So. Rep. 445.

[15] Rex v. Smith, 2 Str. 982; King v. Reynolds, 6 T. R. 497; Rex v. Edwards, 7 T. R. 745; United States v. Williamson, 3 Am. Law Reg. 729; Schouler's Dom. Rel. p. 451; In Matter of Jackson, 15 Mich. 415.

tody of the party entitled thereto, keeping in view, however, the best interests of the child. Jurisdiction for this purpose is exercised upon the single ground that the court is bound to protect the child and care for its welfare. But inevitably in thus dealing with the child, the court determines the rights of the litigants who have precipitated the controversy. The exercise of this power in *habeas corpus* cases is well established by many adjudged cases.[16] But in awarding custody of the child the court will exercise its discretion and be governed by what clearly appears to be for the best interests of the child. Even the legal right of a father to his child will not prevail to give him its custody if the court concludes from the testimony that it will be for the child's best interests to be placed in other's hands.[17] In determining the custody of the infant in these cases the court acts as *parens patriae* and on behalf of society.[18]

Some conclusions may be drawn from the cases that the practitioner will find useful:

1. In *habeas corpus* cases the relator needs to make his application full and complete, by setting forth all of the facts which he is required to prove in order to make a case. It is necessary for the judge to whom the application is presented to be able to see from the application, that the applicant has a good case, otherwise the writ will be denied. This may seem simple and axiomatic; but the reports show many cases where this rule has not been followed.

[16] State v. Richardson, 40 N. H. 272; People v. Cooper, 8 How. Pr. 288; Com. v. Barney, 4 Brews. (Pa.), 408; *In re* Ralston (Ga.), R. M. Charlt, 119; *In re* Bullen, 28 Kan. 781; *In re* Doyle, 16 Mo. App. 159; *In re* Delano, 37 Mo. App. 185; People v. Kling, 6 Barb. 366; People v. Mercein, 8 Paige, 47; Com. v. Higgins (Pa.), 7 Kulp, 398; Com. v. Muir (Pa.), 1 Leg. Rec. 153; *In re* Kottman, 2 Hill (S. Car.), 363; Merritt v. Swimly, 82 Va. 433, 3 Am. St. Rep. 115, 25 Cent. Dig. (C. C.), 1028 to 1038, 15 Am. & Eng. Ency. Law, 184-6.

[17] United States v. Green, Fed. Cas. No. 15,256, 3 Mason, 482; Brunster v. Compton, 68 Ala. 299; Smith v. Bragg, 68 Ga. 650; Ellis v. Jesup, 74 Ky. 403; State v. Smith, 6 Me. 462, 20 Am. Dec. 324; Baird v. Baird, 18 N. J. Eq. 194; *In re* Nofsinger, 25 Mo. App. 116; Versen v. Ford, 37 Ark. 27; *In re* Gates, 95 Cal. 461, 30 Pac. Rep. 596, 25 Cent. Dig. (C. C.), 1028-9.

[18] Wellesley v. Wellesley, 2 Bligh (N. S.), 128. 31 Rev. Rep. 15; DeManneville v. DeManneville 10 Ves. Jr. 52; Butler v. Freeman, Ambl. 302; Blisset's Case, Lofft, 748; *In re* Barry, 42 Fed. Rep. 113; People v. Chegary, 18 Wend. 642.

2. The general rule prevails that the writ cannot be obtained and sustained unless there is in fact an unlawful restraint.

3. When the person sought to be released is an adult a mere stranger may present and maintain the application for his release, although the applicant must assume to act for the person restrained. In all such cases the one restrained is the real person in interest and his rights alone control the decision of the court.

4. When the applicant is a guardian or master of an apprentice or a slave, the relator is the real party in interest and must recover, if at all, upon "the strength of his own title." Yet, when the relator who claims as a guardian fails to maintain his claim, still the court may release the ward if the testimony shows he is unlawfully restrained.

5. When the relator is a parent, his right to the custody of the child will prevail over the rights of a stranger; and, other things equal, the parent will recover. But at this point society steps in to guard the child and protect it even from the parent, when circumstances warrant it and the best interests of the child demand it. If, upon the hearing, the testimony shows that the parent is an unfit person to have the care, custody, control and education of his child and that the respondent is a fit person and of sufficient means to care for and educate the child and its best interests will be subserved by leaving it with respondent, the mere natural right of the parent to his child will not prevail to give it to him. In such case the parent stands in court as the real party in interest, upon his natural right of parent; but he is liable to be defeated by his own wrongdoing or unfitness and by the demands and requirements of society that the well-being of the child shall be deemed paramount to the natural rights of an unworthy parent.

W. L. HAND.

Kearney, Neb.

ATTORNEYS — ADVERTISING FOR DIVORCE BUSINESS AS GROUND FOR DISBARMENT.

STATE V. SMITH.

Supreme Court of Illinois, December 16, 1902.

Where an attorney inserted in a newspaper the following advertisement: "Loyal, wealthy atty. guarantees family freedom in month; no advance costs; witnesses quietly volunteered.—K. 333, Tribune office," — intending thereby to advertise to obtain divorces, in violation of Hurd's Rev. St. 1901, p.

681, and to furnish the necessary evidence, such act showed such a lack of good moral character and such unfitness to practice law as justified his disbarment.

CARTWRIGHT, C. J.: On February 9, 1886, the respondent, Willard C. Smith, was admitted by this court to practice as an attorney at law. A license was issued to him, and his name was placed on the roll of attorneys. Since his admission, he has been engaged in the practice of law in Cook county. By leave of court, the information in this case against him was filed by the state's attorney of Cook county, and a rule was entered requiring him to show cause why his name should not be stricken from the roll of attorneys. He appeared, and a stipulation was entered into by which the case was submitted for decision. By this stipulation respondent admitted the truth of the charge set out in the information, that on August 10, 1902, he inserted in the Chicago *Tribune*, a newspaper published in Chicago, and of general circulation throughout said city and a large number of states of the United States, the following advertisement: "Loyal, wealthy atty. guarantees family freedom in month; no advance costs; witnesses quietly volunteered.—K. 333, *Tribune* office." Another charge contained in the information was waived and withdrawn by the state's attorney. It was further stipulated that, prior to the happening of the transaction alleged in the information, the the conduct of respondent as a practicing attorney had never been brought in question. The meaning of this advertisement, as it was intended to be understood by the public to which it was addressed, is perfectly clear. It represented that respondent was loyal and wealthy; that he guaranteed family freedom in one month; that no advance costs would be required; and that he would quietly furnish witnesses to secure the desired result. The guaranty of family freedom referred to the martial relation, and respondent proposed to insure that which would frequently be impossible by the use of honorable and lawful methods. Family freedom could mean nothing else than freedom from family ties, and the suggestion from respondent that the reference might have been to some other relation, such as the deprivation of personal and property rights or duress of minors, is not reasonable. The public, whose business was solicited, would not understand it in that way. It was an advertisement to aid in procuring divorces, and its publication by respondent was a criminal offense under the provisions of "An act to punish the offense of advertising for divorces." Hurd's Rev. St. 1901, p. 681. The disreputable character of the proposal to act as attorney and furnish the necessary evidence by quietly volunteering witnesses is beyond question, and the attempts of respondent to explain this and other features of the advertisement consistently with his duty as an attorney to his client and the courts are wholly unsuccessful. It seems useless to enlarge upon the meaning or nature of the advertisement. The respondent either intended to mislead and deceive clients or to do what he proposed by the advertisement.

By statute and the rules of court it is made a prerequisite of admission to the bar that the applicant shall possess a good moral character, and if it is shown that he has ceased to possess such a character it is good ground for disbarment. "Any conduct on the part of the attorney evidencing his unfitness for the confidence and trust which attend the relation of attorney and client and the practice of the law before the courts, or showing such a lack of personal honesty or of good moral character as to render the same unworthy of public confidence, constitutes good ground for disbarment." 3 Am. & Eng. Enc. Law, 302. "As a good character is an essential qualification for admission to practice, he may be removed whenever he ceases to possess such a character." 4 Cyc. 916. It was agreed by the stipulation that the professional character of respondent had never been brought into question prior to this charge. That fact would be important and relevant to the question of the truth or falsity of the charge, but it is admitted by respondent that the charge is true.

We are of the opinion that the admitted facts clearly show such a lack of good moral character and such unfitness for the practice of law that the rule must be made absolute, and it is done accordingly. Rule made absolute.

NOTE.—*Disbarment of Attorney for Unprofessional Solicitation of Business.*—Unprofessional conduct on the part of an attorney may in many cases bring down upon him the wrath of the court whose officer he is. This statement of the rule of law in such cases is not generally appreciated by many attorneys, who think they must be guilty of a crime or of some gross unfairness or fraud toward their client in order to justify their disbarment from practice. Undoubtedly, the majority of cases arise under such circumstances, but the courts frown equally as sternly upon actions of an attorney that bring the court or its officers or the law itself into disrepute.

Advertising in General.—Hardly a single important meeting of a bar associations can take place anywhere without some reference being made in the proceedings to the ethics of advertising and as to the extent to which a lawyer may go in soliciting business, and the sentiment seems strong in the younger generation of commercial lawyers to pull away from the old ideals of the profession and to look upon the law more in the nature of a business. Some of the most radical of this class of lawyers have gone to the extent of calling the law a business, and claiming the right to resort to any and all methods made use of in ordinary trade and commerce. Such statements have had the unfortunate effect of leading some of the weaker members of the profession into practices which, though they might be tolerated in business, cannot be tolerated in an officer of the court. And herein lies the secret of the distinction between law and business. The law is not a business nor an independent profession, as that of medicine or dentistry; it is an adjunct to courts of justice. The lawyer is an officer, and as an officer, he owes his superior, the court, every consideration of respect. He can

therefore indulge in no practice that would bring the court or the law into disrepute. If he does he not only incurs the enmity of his own profession but also the severe displeasure of the court who in severe cases will dismiss him as its officer and disbar him from the practice of his profession.

Divorce Advertising.—Divorce advertising seems to be the most prevalent occasion for stumbling on the part of lawyer in soliciting business. Some states prohibit the solicitation of such business altogether under penalty of fine. Where such statutes do not prevail, it is probable that a simple card in a newspaper soliciting divorce business would not be any more reprehensible in the eye of the court than a solicitation of any other branch of legal practice, although in some respects it is more damaging to public morals. But in such advertisement misleading statements are made and false inducements hung out that bring both the courts and the law into bad repute and affects injuriously the public welfare. Thus where an attorney publishes advertisements without any signature, representing that he can procure divorces for causes not known to the law, and without any publicity and without reference to the residence of the parties, and, by such advertisements, solicits business of that character by communication through a particular post office box, by its number, such conduct is a libel on the courts and a disgrace to the attorney, and is calculated to bring reproach upon the profession, and the name of the offending party should be stricken from the roll. People v. Goodrich, 79 Ill. 148. So also an advertisement reading: "Divorces legally obtained very quietly; good everywhere. Box 2344, Denver,"—is against good morals, is a false representation, and a libel on courts of justice, and repeated publications in a newspaper of such advertisement by an attorney constitutes malconduct in his office, for which the supreme court is empowered by statute to strike his name from the roll of attorneys. People v. McCabe, 18 Colo. 186, 32 Pac. Rep. 28, 36 Am. St. Rep. 270. The court in this case takes a very pronounced position: "The ethics of the profession," says the court, "forbid that an attorney should advertise his talents or his skill as a shopkeeper advertises his wares. An attorney may properly accept a retainer for the prosecution or defense of an action for divorce when convinced that his client has a good cause. But for anyone to invite or encourage such litigation is most reprehensible. The marriage relation is too sacred; it affects too deeply the happiness of the family; it concerns too intimately the welfare of society; it lies too near the foundation of all good government to be broken up or disturbed for slight or transient causes. * * * When a lawyer advertises that divorces can be legally obtained very quietly, and that such divorce will be good everywhere, such advertisement is a strong inducement—a powerful temptation—to many persons to apply for divorces who would otherwise be deterred from taking such a step from a wholesome fear of public opinion. * * * Such an advertisement is against good morals, public and private; it is a false representation, and a libel upon courts of justice. Divorces cannot be legally obtained very quietly which shall be good everywhere. To say that divorces can be obtained very quietly is equivalent to saying that they can be obtained without publicity — a libel on the integrity of the judiciary."

Employment of Runners.—Under statutes in force in some states it will be an occasion for disbarring an attorney if he "lends his name to be used as attorney and counselor by another person who is not an attorney and counselor." Such a statute, for instance, is in force in California. It has been held in that state that a contract by an attorney to pay a layman a third of his fee if the layman procures the employment of the attorney by a litigant, is contrary to the public policy of that state, as expressed by the statute we have quoted, as the effect of such a contract is to permit, by indirection, the use of an attorney's name by another not an attorney. Alpers v. Hunt, 86 Cal. 78, 24 Pac. Rep. 846, 21 Am. St. Rep. 17, 9 L. R. A. 483. Since the practice denounced in this case is so often practiced, especially by attorneys making a specialty of negligence cases, it would not be a useless waste of space to call attention to some strong and unusual statements in the court's opinion in this case. Speaking of the attorneys' contract with one, Bolte, a layman, by which the latter was to receive one-third of the fee of the former in any case procured through his efforts, the court said: "Was not Bolte really allowed to use their names in the prosecution of a matter in litigation? Under the employment of them as attorneys, made through Bolte's procurement, they engaged to use their faculties as attorneys and counselors at law for his benefit, and that, too, in a cause in which he had no interest as a party. By the terms of the agreement he was to derive a benefit from the rendition of their services in their professional capacity, and to receive a share of their fee, as if he had been concerned with them as a regularly admitted attorney. He was thus enabled through their agency, vicariously, and not openly and in his own name, to aid in the prosecution of a matter in ligation, and to receive through it such a reward as is usually gained by an attorney regularly admitted to exercise his profession. * * * If such a practice were allowed, an attorney might have a number of undisclosed associates through his agency exercising the functions of an attorney and counselor, and reaping the rewards flowing therefrom, without resting under any of the responsibilities incident to such position, and possessing none of the qualifications which the law demands and requires." Two English cases cited by the court in this case and holding to a different doctrine are criticised and declared incorrect on principles. These cases are Bunn v. Guy, 4 East, 190; Candler v. Candler, Jac. 225.

Buying Up Causes of Action.—In New York a lawyer can be disbarred for "buying up" legal business. Thus, a statute in that state provides that "no attorney shall buy any bond, bill, promissory note, book debt, or other thing in action, with the intent and for the purpose of bringing suit thereon." The courts have held that a violation of this statute is a ground for disbarment. People v. Waldbridge, 6 Cow. (N. Y.) 517. In other states, having no such statute, the "buying up" of business of this nature will not be ground for disbarring the attorney and is only questionable as to the extent such action might violate the rule of law in that particular state against champerty and maintenance. Thus, in Michigan it is a violation of no law for an attorney to purchase a chattel from one party and bring replevin against another to recover possession of it. Town v. Tabor, 34 Mich. 262. In a very recent case, however, it has been held that champerty renders an attorney amenable to summary proceedings for disbarment, notwithstanding it may be effectual as a defense to the enforcement of a contract. *In re* Evans, 22 Utah, 366, 62 Pac. Rep. 913.

Stealing Another Attorney's Patronage.—It is also a good ground for the disbarment of an attorney that he endeavored to win business by stealing the patron age of a brother attorney. Nothing, perhaps, could be more reprehensible, at least to the eyes of the profession, than such conduct. One attorney has no right to intermeddle with the clients of another attorney and endeavor to secure his own employment at the expense of the other. He may be disbarred for such practice. Baker v. State, 90 Ga. 153. In this case it was considered a proper cause for striking an attorney from the rolls that he intermeddled between a brother attorney and his client, grossly slandered the former and endeavored to induce the client to forsake the advice of her own counsel and follow his instead, offering to furnish advice without charge.

JETSAM AND FLOTSAM.

ADMISSION OF LEGAL LIABILITY — EVIDENCE OF OFFER OF AID, OR OF AID, TO INJURED PERSON, WITHOUT MORE, INCOMPETENT.

Considerable comment has been called forth by the case of Powell v. McGlynn and Bradlaw in the Irish courts (2 Irish Reps., 1902, page 154). It appeared that the defendant Bradlaw lent to the defendant McGlynn a pony and trap; that McGlynn took two ladies out driving and upon returning to their home left the horse standing in the street unguarded, whereupon it ran away and injured the plaintiff. The latter sued both Bradlaw, the owner, and McGlynn, in whose charge the horse was, and upon the trial a verdict was had for damages against both defendants. The attempt to hold the defendant Bradlaw liable was on the theory that McGlynn was acting as his servant at the time of the negligence, and practically the only evidence to sustain such contention was the fact that the day after the occurrence Bradlaw saw plaintiff's daughter at the hospital where her father was, expressed regret that it was his horse that occasioned the damage and offered to pay the expenses if she would remove her father from the hospital. The court of kings bench were evenly divided on the question whether there was sufficient to sustain the judgment against Bradlaw, but the court of appeal unanimously and very properly as it seems to us, held that a nonsuit should have been granted as to him. We are unable to account for the serious division of judicial opinion upon the subject or understand why the matter should have called forth such elaborate discussion. The following extract from the syllabus of the decision of the court of appeal very obviously states the law as it ought to be: "That there was no evidence to support the finding that M was the servant of B; that no presumption of the relationship of master and servant arose from the fact of M driving B's pony and trap; that the offer to pay expenses was made on the basis of B having lent the pony and trap to M and could not be treated as an admission of liability on another hypothesis." The court of appeal distinguishes the case from cases of omnibuses or other such conveyances, where the "person in charge is manifestly acting as the servant of some one, and presumably of the owner."

It would seem to be elementary law that no liability is created, as against a person not already liable, and no liability is recognized, by an offer to pay the expenses of, or the rendering of any assistance to, an injured person. On this point the American case of Sias v. Consolidated Lighting Co., 73 Vt. 35, is in point. In the opinion occurs the following language: "The plaintiff was permitted to testify that the defendant furnished him a nurse. The testimony was offered as tending to show a recognition of liability, and the defendant objected to it as having no such tendency. The court below took the ground that it could not say as matter of law that it had no such tendency but that it should be submitted to the jury for them to say whether in view of all the circumstances it had that tendency or not. This was right, if the case presented circumstances which tended to characterize the act as a recognition of liability; but we have found nothing of this nature in our examination of the testimony. It is doubtless true that such evidence might be offered in a connection that would give it the effect claimed, but we think that the mere fact that an employer furnishes a physician or nurse for one who meets with a disabling accident in his service ought not to be received as evidence tending to establish his liability. It must be the impulse of every humane employer to provide this asistance for a disabled workman without means, and the rule of evidence ought to be such as to permit his doing it without danger to himself. Such an act should be treated as a humane recognition of an existing necessity, and not as an admission of the justice of a claim not then asserted."—*New York Law Journal.*

JUSTIFIABLE (?) LYNCHING.

In his clever story, "The Virginian," Mr. Owen Wister puts into the mouth of Judge Henry a cogent and plausible justification of lynching under exceptional circumstances:

"When your ordinary citizen sees * * * that he has placed justice in a dead hand, he must take justice back into his own hands where it was once at the beginning of all things. Call this primitive if you will. But so far from being a defiance of the law, it is an assertion of it—the fundamental assertion of self-governing men, upon whom our whole social fabric is based."

The situation presented in this novel is that of absolute hopelessness of procuring the conviction of cattle thieves by juries, whence it was argued that it was legitimate for the cattle owners to take the matter of punishment into their own hands. Outside of the question of the infliction of the capital penalty for a comparatively trivial crime, it must be granted that Judge Henry's abstract argument is sound. Upon substantially that argument, we believe history has justified the acts of the famous "Vigilance Committee" of California. A few months ago the writer heard an interesting discussion by a merchant of New Orleans, in which the lynching of the Italians in that city during the Harrison administration, which occasioned quite an acute international complication, was justified on similar grounds. According to this gentleman's statement, the Italians in question has not been convicted upon their trial for murder, although the evidence of their guilt was overwhelming, because members of the jury had been terrorized by threats of being themselves killed by the confederates of the prisoners in case an adverse verdict was given. The murder was one of a series of "Mafia" outrages, and, as far as crimes by Italians were concerned, it was becoming evident that justice had passed into a dead hand through fear of "Mafia" methods. The gentlemen vouched for the high social and business standing of the leaders of the lynching party, and claimed that the deterrent effect of the summary execution in subsequent lessening of "Mafia" crimes was unmistakable.

Upon this subject it is possible only to generalizes It may be admitted that as tyranny or hopeless Bourbonism on the part of a government may justify it overthrow by revolution, so the inertness or utter inefficiency of one branch of government may justify a partial and temporary revolution in the form of a resort to lynch law. What the circumstances are that morally would authorize such a step must depend upon the particular situation as it arises, and it may be said that such situations very rarely arise, especially in older and thickly inhabited communities. That Judge Henry's plea would not, and was not intended to, cover the kind of lynching unfortunately so common in the south and occasionally cropping out elsewhere in the Union, is emphasized by a further extract from his language:

"Now we'll take your two cases that you say are the same in principle. I think that they are not. For in the south they take a negro from jail where he was waiting to be duly hung. The south has never claimed that the law would let him go. But in Wyoming the law has been letting our cattle thieves go for two years. We are in a very bad way, and we are trying to make that way a little better until civilization can reach us. At present we are beyond its pale. The courts, or rather the juries, into whose hands we have put the law, are not dealing the law."—*New York Law Journal.*

CORRESPONDENCE.

"THE INITIATIVE AND REFERENDUM UNDER THE UNITED STATES CONSTITUTION."

To the Editor of the Central Law Journal:

I have not been asked but feel constrained to send the CENTRAL LAW JOURNAL some thoughts that come to me on reading the article of Hon. T. A. Sherwood in your issue of March 27, 1903, on the above subject.

After quoting the constitutional amendment framed by the last legislature of Missouri, and submitted to be voted upon, he opposes it on the following grounds: 1. It takes the legislative power out of the "General Assembly of Missouri" and vests it in the "electors of the state." 2. It is in conflict with the clause of the United States Constitution that declares "The United States shall guarantee to every state in this union a republican form of government." 3. Special objection to this clause of paragraph 6, "Any law or part of a law approved or enacted by the electors as aforesaid, shall not have its force, intent or purpose impaired or annuled by any ruling, decision or constitution of any of the courts of this state. * * * The veto power of the governor shall not be exercised as to any laws approved or enacted by the electors." Mr. Sherwood commences his comments by quoting a definition, that refers to the use of the term "referendum" in Switzerland and would thus leave the impression that it is a foreign or European measure. In this he is in error; it has always been in use in the United Seates in the enactment of federal and state constitutional law. Our federal convention formulated the original of the federal constitution, initiated it into consideration and referred it back to the people to be adopted or rejected by a vote at the polls or their delegates chosen for the purpose. The amendments were so formulated by congress and referred to the people of the states; the same of all the original and revised state constitutions. So that the only innovation in its use, under our system is, that of extending its office to the enactment and adoption of statutory as well as constitutional law.

Viewed in this, its true light, there is nothing in it to startle the American mind or on which to base the charge, that it is "revolutionary." Viewed in this light there is no force in his first objection of changing the depository of the legislative power from the General Assembly to "the electors," the voters of the state. Can a fountain mental or material rise higher than its source? Are not the members of the General Assemably the agents and servants of the "electors?" Is it not legally, mentally, morally and of natural right and law, in the power of the electors of the state to limit the powers of their creative agent and servant, the General Assembly? We think it is, and Mr. Sherwood did not even pretend to quote an authority or give one reason to show they do not have such power.

If the "electors" on this referendum of this amendment adopt it, it, too, is constitutional, the latest and most authoritative voice and command of the people; it is the constitution on that subject.

To sustain his second objection he tries to draw a distinction between a republic and an absolute democracy, by definition, and then tries to make it appear that the measure would make our state an absolute democracy instead of a republic. He asserts that "A republican form of government is necessarily a representative government, by delegation, instead of a pure democracy, where the people directly enact all laws and perform all other functions of government—legislative, executive and judicial—without the intervention of agents." He thus admits the people, "the electors," are the principals in the transaction; he and all objectors on his grounds assume the role of champion and defender of the agent, the man who claims under a power of attorney and asserts that the principal shall not dismiss the agent, or even as here curtail or limit his powers in any degree; that, too, an agent and trustee who has no vested interest in his office or position, as the judge has often decided.

Whatever form our institutions have assumed, will he deny that they were and are an attempt to make these words and principles "the head of the corner": "We hold these truths to be self-evident; that all men are created equal; that they are endowed by the Creator with certain inalienable rights, among which are life, liberty and the pursuit of happiness; that to secure these rights, governments were instituted among men, deriving their just powers from the consent of the governed." And tested on that principal in truth and in fact, the federal government never has been but little, if any, more than half a republic, let alone an absolute or any other democracy; the elector never has had any direct vote or choice for only one of the five sets or classes of officers who administer the federal government, that of congressman; for the others he only votes for a man to choose another for him. In our state the electors have the direct vote or choice of the legislative, judicial and executive agents. But while the governor has a real or veto power over the legislative body, all the "electors," as it now is, have none, only in choosing a new set of agents to end their work.

The measure does not propose to, and in fact does not, confer on the "elector" any power that he does not now have; but only gives him a more direct and summary use of his power of veto and recall on legislation. It is only a measure to more effectively apply the doctrine and principal, that governments derive their just powers from the consent of the governed.

If the "power" of the agent or trustee is thus a derived one from the principal, the "electors," is it not a measure of common sense and law, that the principal shall have and retain the right of supervision of the work, or even the entire recall of the agent or trustee, who has no vested interest as such in his agency in matters of legislation.

And we have more reason to say that the measure is only one to make a complete republican state government of an imperfect one, than he has to say it is making of it an absolute or true democracy. The measure does not make our state government comply with his own definition of a pure democracy; namely, "where the people directly enact all the laws and perform all the other functions of government, legislative, executive and judicial, without the intervention of agents." The measure does not propose the people will "directly enact all laws, and perform all the other functions of government." The case does not even come in his own definition, and his argument falls in two of its own weight. His argument is that the agents and trustees have the right to sit in judgment on their own work and employment on issue joined between them and their principal, and decide the nature of their work, and that they will not resign, submit to recall, nor even the limitation of the powers of the agency. That seems to me to be a spectacle of despotism, quite as dangerous to republican institutions as the measure of direct legislation.

His attempt to sustain his third objection is equally futile. He loses sight of the fact that each and every law adopted by the electors, under the provisions of the measure, would be adopted with all the forms, solemnity and sanction of the constitution and of the same authority. Did he as a judge in his thirty years of service ever sit in judgment on an admitted provision of one of our state constitutions? The offending clause only declares that a law thus adopted by the people, the "electors," shall not be construed away by any of the courts of this state. They have for a while construed away some of the provisions of the constitution of this state, and admitted it and came back to it, as section 12 of article 10, constitution. If the "electors" are not the judges of the "just powers" they will confer on or take from their official agents and trustees, who are?

He insinuates the federal supreme court. The court that held that the taxing power is at least, in part, gone beyond the recall or exercise of the electors, by a divided count; that is now debating whether the constitution follows the flag in our peregrinations in military imperialism; that calmly decided that a colored slave had no civil rights that a white master was bound to respect. Composed of men appointed for life or good behavior, nominated by the president, not chosen by a direct vote of people, only as it is done in violation of the constitution, confirmed by senators chosen by legislatures, chosen by the "electors." In a word, a body of men in whose election the "electors" have no more direct choice than in chosing the king of England.

We will see if they will declare a measure of a state to institute direct legislation unconstitutional. He admits, as he must, that "No particular form of government is designated as a republican, neither is the exact form to be guaranteed in any manner especially designated." Who shall say that the "electors," if they choose, may not in the legislative department of the republic use some of the measure of an ancient pure democracy, and still their government, state or federal, be republican in form. He asserts "the legislative power cannot be halved, quartered, or in any other way subdivided. That is simply his *ipsi dixit*. The head of the corner of our institutions is that governments derive their just power from the consent of the governed.

It is affirmed by submitting every line and paragraph of our higher constitutional law after it is framed back for adoption or rejection by the "electors" by a vote at the polls.

Is it not the highest function and act of law-making, the highest law known to our republican institutions? Have not the electors always been entrusted with it? Why may they, then, not also be entrusted with the same power over the enactment of statutory law? Does not the greater power, in this instance, include the less, if the "electors" choose to assert and use it?

The judge's argument is labored, far-fetched, and breaks more than once of its own weight. We venture, the federal supreme court will never declare the principle of direct legislation applied to statutory law to be unrepublican and unconstitutional.

Edina, Mo. O. D. JONES.

BOOK REVIEWS.

VI. CYCLOPEDIA OF LAW AND PROCEDURE.

The volume which we have undertaken to review at this time is one of a certain series which has already received favorable mention in these columns. The Cyclopedia of Law and Procedure has taken too strong a hold in the favor of the bench and bar of this country to permit of any doubt being entertained as to its ultimate success. Already as you pick up any of the late reports and glance through its pages you will find citations to this work in such numbers indeed as to excite wonderment and curiosity especially when it is taken into consideration that all the subjects of the law indexed do not extend alphabetically beyond the letter C. The present volume opens with a consideration of the subject of Builders and Architects and closes with the subject of Chattel Mortgages. The articles and their contributors are as follows: Builders and Architects, by Henry Stephens, 117 pages; Building and Loan Societies, by Hon. Charles V. Bardeen, late of the Supreme Court of Wisconsin, 152 pages; Burglary, by Arther Lee, 681 pages; Canals, by Robert M. Heath, 25 pages; Cancellation of Instruments, by John Norton Pomeroy, the son of the noted text-writer bearing the same name, 70 pages; Carriers, by Hon. Emlin McClain of the Supreme Court of Iowa, 329 pages; Action on the Case, by A. C. Boyd, 26 pages; Cemeteries, by A. C. Boyd, 18 pages; Census, by F. E. Jennings, 5 pages; Certiorari, by James B. Clark, 117 pages; Champerty and Maintenance, by Frank W. Jones and J. B. Robertson, 48 pages; Charities, by Hon. John M. Gould, 95 pages; Chattel Mortgages, by Hon. Leonard A. Jones, 142 pages. The last subject mentioned, by Mr. Jones, is not concluded but will be continued in volume 7. This article, together with that by the Hon. Emlin McClain on the subject of Carriers, we consider the best treated topics that have so far appeared in this or any other encyclopedia of law. Such articles as these, and by such contributors, will soon stamp this work with an air of respectability and authority as will cause it to be cited everywhere in the briefs of counsel and in the opinions of the courts. The volume before us is a most excellent sample of this most superlative series. The present volume contains 1,122 pages of

matter printed on good paper and bound in a fine quality of sheep. Published by the American Law Book Company, New York.

HUMOR OF THE LAW.

"John," asked the lawyer's wife, who had recently taken up the self-culture fad, "is it best to lie on the right side or the left side?"

"My dear," replied the egal luminary, "if one is on the right side it usually isn't necessary to lie at all."

In Ohio, as in several other states, persons condemned to death are taken to the state capitol for execution.

Recently, in the Greene County Court, a jury was being chosen to try a murder case.

One member of the panel had been asked the usual questions, and had given satisfactory answers, until the lawyer for the defense inquired:

"Do you believe in capital punishment?"

"No, sir," was the prompt reply. "I believe in hanging them right here at home."

Some years ago members of a jury in Kansas were much incensed at being locked up at night owing to the obstinacy of one of their number, a man of the name of Knox.

On being ushered into the jury box next morning the foreman solemnly rose and thus delivered the verdict, which during the nocturnal hours he and his indignant colleagues had arrived at:

By Knox our verdict was delayed,
And we in durance landed;
But kicks with Knox improvements made,
And full assent commanded.
We now do find, all at one time,
The prisoner guilty of the crime.

The judge accepted the verdict, but, after studying for a moment the spectacle presented by the obnoxious Knox, remarked that he could not agree with the third line.

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. ACCIDENT INSURANCE — Total Disability. — One is totally disabled, within an accident policy, when he is incapacitated from his work or business, though he is occasionally able to take a car to his doctor's office. — Mutual Ben. Assn. v. Nancarrow, Colo., 71 Pac. Rep. 428.

2. AGRICULTURAL SOCIETY—Fairs.—It is the duty of an agricultural society to use reasonable care to see that there is no firing of dangerous firearms on the grounds under such conditions as jeopardize the life of any of those invited to the fair.—Thornton v. Maine State Agricultural Soc., Me., 53 Atl. Rep. 979.

3. ANIMALS — Failure to Furnish Food. — Under Pen. Code, §§ 703, 705, the willful omission or neglect to furnish an animal food sufficient for its sustenance by its owner or keeper is a misdemeanor. — Griffith v. State, Ga., 43 S. E. Rep. 251.

4. APPEAL AND ERROR—Dismissal.—Where indispensable parties are omitted from an entry of appeal, and have not appeared, it will be dismissed. — Anderson v. Laurent, Fla., 33 So. Rep. 237.

5. APPEAL AND ERROR — Injunction. — Unless it clearly appears that the ruling on the motion to dissolve temporary injunction is against the weight of evidence, it will not be reversed on appeal. — Baya v. Town of Lake City, Fla., 33 So. Rep. 400.

6. APPEAL AND ERROR — Regularity. — An appellate court will not, on its own motion, notice a defect of allegation in a bill in equity, unless the defect be such that the bill wholly fails to state a case for equitable relief.— Hughey v. Winbone, Fla., 33 So. Rep. 249.

7. APPEAL—Review.—A judgment will not be reviewed at the instance of one who has neither appealed nor asked for an amendment.—Bradley-Ramsay Lumber Co. v. Perkins, La., 33 So. Rep. 351.

8. ATTORNEY AND CLIENT — Advertising for Divorce Business.—Insertion of an advertisement in a newspaper by an attorney, offering to obtain divorces quietly by the testimony of volunteered witnesses, held sufficient to justify his disbarment. — People v. Smith, Ill., 66 N. E. Rep. 27.

9. BAILMENT — Interest of Bailee.—A railroad company has such property in cars which it holds under lease, and in cars of other companies temporarily in its possession and use as bailee, as will support an action for their wrongful injury or destruction.—City of Chicago v. Pennsylvania Co., U. S. C. C. of App., Seventh Circuit, 119 Fed. Rep. 497.

10. BANKRUPTCY — Discharge. — A bankrupt cannot be refused a discharge because of a failure to schedule land which he conveyed long prior to the passage of the bankruptcy act, unless it is clearly shown that he actually owned it, or an interest therein, at the time of the bankruptcy. — *In re* Countryman, U. S. D. C., N. D. Iowa, 119 Fed. Rep. 689.

11. BANKRUPTCY—Discharge.—Specifications opposing a petition for a bankrupt's discharge must be signed and sworn to by the opposing creditor or creditors, and not by attorney or counsel. — *In re* Glass, U. S. D. C., S. D. N. Y., 119 Fed. Rep. 509.

12. BANKRUPTCY—Preference.—A payment received by a creditor of a bankrupt from a third party, and which did not come out of the assets of the bankrupt, does not constitute a preference.—Dressel v. North State Lumber Co., U. S. D. C., E. D. N. Car., 119 Fed. Rep. 531.

13. BANKRUPTCY—Preference.—Mechanic's lien creditors of a bankrupt held entitled, under an order directing the sale of property as an entirety, including that covered by their liens, to assert their rights to a preference against the fund produced by the sale. — George Carroll & Bro. Co. v. Young, U. S. C. C. of App., Third Circuit, 119 Fed. Rep. 576.

14. BANKRUPTCY — Procedure Before Referees.—On an application of a trustee in bankruptcy to the court for advice as to whether he should file a petition to have the claim of a creditor expunged for fraud, the referee has no authority to hear and determine the subject-matter of such petition on the merits. — *In re* Baber, U. S. D. C., E. D. Tenn., 119 Fed. Rep. 520.

15. BANKRUPTCY — Title to Assets. — Under Bankr. Act 1867, § 14, the property of the bankrupt remained in him until an assignee had qualified and the register had assigned the same to him. — Leathem & Smith Lumber Co. v. Nalty, La., 33 So. Rep. 354.

16. BANKS AND BANKING — Deposit. — A bank becomes the absolute owner of money deposited with it to the general credit of the depositor, in the absence of any special agreement importing a different character into the transaction. — Camp v. First Nat. Bank, Fla., 33 So. Rep. 241.

17. BANKS AND BANKING — Indebtedness.—Assignee of bank stock held to have no right to insist that payments made by the assignor on an indebtedness to the bank should be applied otherwise than as the assignor directed, or that credit voluntarily given by the bank should go to the extinguishment of the debt arising before it had received notice that he had assigned his stock. — People's Bank v. Exchange Bank, Ga., 43 S. E. Rep. 269.

18. BENEFIT SOCIETIES — Suicide. — An amendment of a fraternal benefit association, limiting its liability in case of suicide, construed and held unfair and unreasonable, and therefore not binding on existing members. —Bottjer v. Supreme Council American Legion of Honor, 79 N. Y. Supp. 684.

19. BILLS AND NOTES — Consideration. — Under the modern American rule, a partial failure of consideration may be pleaded as a defense in an action at law on a note. — American Nat. Bank v. Watkins, U. S. C. C. of App., Seventh Circuit, 119 Fed. Rep. 545.

20. BILLS AND NOTES — Joint Makers. — Parties who placed their names on the back of a note before delivery, for the purpose of lending credit to the instrument, held as joint makers. — Camp v. First Nat. Bank, Fla., 33 So. Rep. 241.

21. BOUNDARIES — Action to Establish. — Where land was conveyed by metes and bounds, the position of a corner, not fixed by a monument, will be determined by the corners and distances according to the magnetic meridian.—Ayers v. Huddleston, Ind., 64 N. E. Rep. 60.

22. BUILDING AND LOAN ASSOCIATION— Insolvency.— A building association is insolvent when its available assets are below the level of the stock already paid in and it cannot pay to the stockholders their contributions.—Continental Nat. Building & Loan Assn. v. Miller, Fla., 33 So. Rep. 404.

23. BURGLARY—Evidence.— Statement of a witness to defendant's wife not shown to have been known to him held inadmissible on trial for burglary.—Long v. State, Miss., 33 So. Rep. 224.

24. CARRIERS — Injury to Passenger.— Carrier selling ticket from connecting line held liable for injury to passenger before it delivered its car to a connecting line.— Oliver v. Columbia, N. & L. R. Co., S. Car., 43 S. E. Rep. 807.

25. CARRIERS—Matter of Common Knowledge.—Jerks on a freight train held a matter of common knowledge, so that whether a passenger thereon had such knowledge cannot be left to the jury.—Southern Ry. Co. v. Crowder, Ala., 33 So. Rep. 335.

26. CARRIERS—Negligence.—The breaking of an axle of a car held to raise a presumption of negligence in inspection, and the burden of rebutting it is on the carrier.—Western Maryland R. Co. v. State, Md., 58 Atl. Rep. 969.

27. CHATTEL MORTGAGES — Priority. — Holders of a deed of trust given as security for an antecedent debt, with notice of a prior chattel mortgage, held to take subject to the chattel mortgage. — Burford v. First Nat. Bank. Ind., 56 N. E. Rep. 78.

28. COLLISION — Overtaking Vessel. — The fault of an overtaking vessel for a collision being established, in determining the question of the contributory fault of the vessel overtaken, every reasonable doubt should be resolved in her favor. — The Atlantis, U. S. C. C. of App., Sixth Circuit, 119 Fed. Rep. 568.

29. COMMERCE— License Tax.—Norfolk City Ordinance No. 126, imposing a license tax on telegraph companies, held not in violation of Const. U. S. art. 1, § 8, as a regulation of commerce between the several states. — Postal Tel. Cable Co. v. City of Norfolk, Va., 43 S. E. Rep. 207.

30. COMMERCE—Occupation Tax.— Carrier engaged in interstate and intrastate commerce held not liable for occupation tax imposed by Pol. Code, § 4074.—State v. Northern Pac. Exp. Co., Mont., 41 Pac. Rep. 404.

31. CONSTITUTIONAL LAW— Injunction.— Denying defendant hearing on application for temporary injunction on account of his previous contempt held denial of due process of law.—Harley v. Montana Ore Purchasing Co., Mont., 71 Pac. Rep. 407.

32. CONSTITUTIONAL LAW — Subcontractor's Lien. — 2 Starr & C. Ann. St. 1896, p. 2572, § 24, relative to liens of subcontractors furnishing material for public improvements, held not invalid as giving privilege to the subcontractor which the contractor does not enjoy.—West Chicago Park Comrs. v. Western Granite Co., Ill., 66 N. E. Rep. 87.

33. CONTRACTS— Personal Representative.— In an action against personal representative of deceased joint debtor, insolvency of survivors or their inability to pay must be alleged.— Potts v. Dounce, N. Y., 66 N. E. Rep. 4.

34. CONTRACTS—Persons not in Privity.—An engineer, injured by an explosion of oil purchased by his employer, cannot maintain an action against the seller to recover for the injury, on the ground that the oil was not of the quality represented.—Standard Oil Co. v. Murray, U. S. C. C. of App., Seventh Circuit, 119 Fed. Rep. 572.

35. CONTRACTS—Real Estate Corporations.—Directors of a real estate and loan company held to have authority under its charter to execute a bond and secure the same. — Hutchinson v. Rock Hill Real Estate & Loan Co., S. Car., 43 S. E. Rep. 295.

36. CORPORATIONS — Appointment of Receivers. — Courts of equity are authorized to appoint receivers on the application of minority stockholders in extreme cases only.—Continental Nat. Building & Loan Assn. v. Miller, Fla., 33 So. Rep. 404.

37. CORPORATIONS—Eminent Domain. — The granting of the right of eminent domain to a corporation renders the company subject to government regulation in the public use of its property or products.— Fallsburg Power Mfg. Co. v. Alexander, Va., 43 S. E. Rep. 194.

38. CORPORATIONS—Forfeiture.—A cause for forfeiture of a corporation cannot be taken advantage of or enforced against it, collaterally or incidentally.— Nicolai v. Maryland Agricultural & Mechanical Assn., Md., 58 Atl. Rep. 965.

39. CORPORATIONS — Obstruction of Street. — Circuit court held to have no power to grant a corporate charter authorizing the obstruction of a public highway in the city.—City of Richmond v. Smith, Va., 43 S. E. Rep. 845.

40. COSTS — Pauper Criminal. — Under Burns' Rev. St. 1901, § 5594g1, attorney, rendering services under appointment of court for pauper criminal, held not entitled to compensation beyond the existing appropriation for that purpose.—Board of Comrs. of Miami County v. Mowbray, Ind., 66 N. E. Rep. 46.

41. COUNTIES—Action on Bond.—In an action for several breaches of a county auditor's bond it was not necessary that each item should be set out in a separate paragraph.—Nowlin v. State, Ind., 66 N. E. Rep. 54.

42. COUNTIES — Formation — The determination by the legislature of the existence of facts necessary to the formation of a new county cannot be assailed in any court by evidence *aliunde*.—Fraser v. James, S. Car., 43 S. E. Rep. 292.

43. COURTS— Stare Decisis. — The doctrine of *stare decisis* held not to preclude the supreme court from overruling a former decision under the facts.—Colorado Seminary v. Board of Comrs. of Arapahoe County, Colo., 71 Pac. Rep. 410.

44. CRIMINAL LAW — Confession. — A promise to one charged with a crime that he will be protected from others implicated, held not sufficient to render the ensuing confession inadmissible.—Hunt v. State, Ala., 33 So. Rep. 329.

45. CRIMINAL LAW — Failure to Call Witness. — The state held not compelled to introduce all witnesses whose names were indorsed on the indictment—Carle v. People, Ill., 66 N. E. Rep. 32.

46. CRIMINAL LAW — Resisting Officer — In a prosecution for resisting a police officer by interference with his search of premises in which liquors are sold, certain evidence held to be immaterial, but not prejudicial — People v. Miller, 79 N. Y. Supp. 1122.

47. CRIMINAL LAW — Separation of Jury. — It is not error to permit a juror during a trial for murder to separate himself from the jury to go to a closet, the door of which opens into the court room and within which there is no other person than the sheriff. — State v. Callian, La., 33 So. Rep. 368.

48. CRIMINAL TRIAL—Examination of Witness.—Where an important witness for the state was examined in the absence of accused, held that a mistrial should have been entered and a *venire de novo* ordered.—Booker v. State, Miss., 33 So. Rep. 221.

49. CRIMINAL TRIAL — Instructions — It was not cause for a new trial that the court remarked to the jury: "Gentlemen, I have been requested to put my charge in writing. This why we have been delayed in submitting my charge. I had to complete my charge in writing."—Hodge v. State, Ga., 43 S. E. Rep. 255.

50. CRIMINAL TRIAL— Instructions.—The court should instruct on each theory of the defense which there is any evidence to establish.—Territory v. Baca, N. M., 71 Pac. Rep. 460.

51. CRIMINAL TRIAL — Joint Indictment. — On a joint indictment of two or more persons, the state with the permission of the court, may elect to try any or all of them separately.—State v. Prater, W. Va., 43 S. E. Rep. 280.

52. CRIMINAL TRIAL — Judicial Notice.—Judicial cognizance will be taken of the fact that whisky is a spirituous liquor.—Hodge v. State, Ga., 43 S. E. Rep. 255.

53. CRIMINAL TRIAL — Polling Jury. — Action of the jury in a murder trial in giving their initials to the clerk after their discharge, held no part of the trial, so as to prejudice the right of the absent prisoner to be present at the whole trial.—Swan v. State, Miss., 33 So Rep. 223.

54. CRIMINAL TRIAL — Remarks by Judge. — It is not error to refuse a mistrial on account of remarks by a judge, not applicable to the case and in no way injuriously affecting the rights of the accused—Perry v. State, Ga., 43 S. E. Rep. 253.

55. CRIMINAL TRIAL—Reopening Case.—It is in the discretion of the trial judge whether he will reopen the case after both sides have closed and argument is begun. —Duggan v. State, Ga., 43 S. E. Rep. 258.

56. DAMAGES—Punitive—In action for personal injuries punitive damages may be awarded for wilful invasion of a private right.—Oliver v. Columbia, N. & L. R. Co., S. Car., 43 S. E. Rep. 307.

57. DESCENT AND DISTRIBUTION—Surviving Husband. —The surviving husband of a woman, who dies leaving a child by a former marriage, and none by her marriage with him, has no right of usufruct in her estate.—Succession of Emonot, La., 33 So. Rep. 368.

58. DIVORCE—Leaving State.—Complaint in action to enforce bond, conditioned that husband, sued for divorce, would not leave state without leave of court, held good as against demurrer.—Marselis v. People, Colo., 71 Pac. Rep. 429.

59. EMBEZZLEMENT — Criminal Intent. — The act of an agent in knowingly failing to account for the amount of a shortage indicated by his books, and which he knows is as to his principal's money, is evidence of criminal intent.—Willis v. State, Ala., 33 So Rep. 226.

60. EMINENT DOMAIN—Compensation.—A city held to have no right to have compensation for property condemned for a sewer limited to its value for a certain number of years, within which it alleges its intention to discontinue the use; Act April 14, 1881, p. 234, § 4, relative thereto, not sanctioning it.— City of Waterbury v. Platt, Conn., 53 Atl. Rep. 958.

61. EMINENT DOMAIN — Dealing in Fuel.—The circumstances under which the legislature may authorize cities and towns to purchase fuel and sell to their inhabitants defined.—*In re* Municipal Fuel Plants, Mass., 66 N. E. Rep. 25.

62. EMINENT DOMAIN—Opening Public Street.— Equity has jurisdiction to enjoin a city from opening a public street without the owner's consent through his land, which has never been condemned or used as a street.— Baya v. Town of Lake City, Fla., 33 So. Rep. 400.

63. EQUITY— Final Decree. — A decree directing a receiver to get in all funds not heretofore brought in, and make report thereof, held not a final decree.— Gunnell's Admrs. v. Dixon's Admr., Va., 43 S. E. Rep. 340.

64. EVIDENCE—Judicial Notice.— In determining the novelty of a patented device, the court will take judicial notice of matters of common knowledge relating to the state of the prior art.— Farmers' Mfg. Co. v. Spruks Mfg. Co., U. S. C. C., E. D., N. Car., 119 Fed. Rep. 594.

65. EXCHANGES—Expulsion of Member.—Where it appears that the committee of the New York Stock Exchange having charges against members has proceeded regularly under the rules, and rendered a decision finding a member guilty of fraud, a presumption arises that such decision was founded on sufficient evidence. — Young v. Eames, 79 N. Y. Supp. 1068.

66. EXECUTION—Judgment.—Modification of judgment entered after expiration of term, granting stay of execution against particular property, held erroneous.— Lewis v. Linton, Pa., 53 Atl. Rep. 999.

67. EXECUTORS AND ADMINISTRATORS—Allowance for Attorney.— Where, on settling the account of an administrator who had been suspended, the court allowed him a certain sum for the attorney's services, such attorney cannot recover such sum from the estate.— McKee v. Soher, Cal., 71 Pac. Rep. 438.

68. EXECUTORS AND ADMINISTRATORS— Devastavit.— An executor held not guilty of negligence as to funds of the estate in the hands of his coexecutor, so as to render him liable for such coexecutor's *devastavit*. — *In re* Hoagland's Estate, 79 N. Y. Supp. 1080.

69. EXECUTORS AND ADMINISTRATORS— Sale of Land. —A sale of land by administrators held not subject to a collateral attack for an apparent defect in the proceedings subsequent to the decree. — Mott v. Ft. Edward Waterworks Co., 79 N. Y. Supp. 1100.

70. FALSE IMPRISONMENT — Forced Appearance. — Where a person was arrested and brought before a court under a warrant which was void, because issued without jurisdiction, such forced appearance was not a waiver of his rights.—Church v. Pearne, Conn., 53 Atl. Rep. 955.

71. FIRE INSURANCE— Warranties.—Those representations and promises in a policy of insurance which have by the contract been declared warranties must be accorded that character by the court.—Germier v. Springfield Fire & Marine Ins. Co., La., 33 So. Rep. 361.

72. FRANCHISES— Construction. — Resolution of town granting person a right to build a highway held, not, by

implication, to authorize him to use earth from the lands of the town in the creation of such highway.—Trustees of Freeholders and Commonality of Town of Southampton v. Jessup., N. Y., 65 N. E. Rep. 949.

73. FRAUDS, STATUTE OF—Parol Agreement.—A parol agreement establishing a boundary line between adjoining tracks of land is not within the statute of frauds. —Dierssen v. Nelson, Cal., 71 Pac. Rep. 456.

74. FRAUDS, STATUTE OF — Suit for Rent. — Wife's promise to pay rent, in consideration of retaining possession of land leased by deceased husband, held an original undertaking, and not within the statute of frauds.—Linam v. Jones, Ala., 33 So. Rep. 343.

75. GARNISHMENT — Judgment of Sister State.—That after a debtor has been garnished in a sister state, but before judgment there, the creditor has obtained a domestic judgment, will not prevent the payment of the foreign garnishment judgment from operating as a protection to the debtor. — Baltimore & O. S. W. R. Co. v. Adams, Ind., 66 N. E. Rep. 43.

76. GUARDIAN AND WARD—Authority of Tutor.—Where a tutor on his own authority accepts on a good claim less than the amount due his ward, he is liable for the difference.—Succession of Emonot, La., 33 So. Rep. 368.

77. GUARDIAN AND WARD — Power of Court.— Code of Civil Procedure held not to empower the district court, sitting in probate, on default of a purchaser at guardian's sale, to set aside the sale and direct the guardian to retake possession.—State v. District Court of First Judicial Dist., Mont., 71 Pac. Rep. 401.

78. HEALTH — Compensation of Physician.— Where a board of health employed a physician and fixed no compensation, in an action to recover for his services, any act of the board of health, after the services were rendered fixing the compensation, is admissible. — Clement v. City of Lewiston, Me., 53 Atl. Rep. 984.

79. HOMICIDE — Habits of Deceased. — Evidence of decedent's vicious habits held inadmissible, before a foundation had been laid that deceased, and not defendant, was the assailant.—Carle v. People, Ill., 66 N. E. Rep. 32.

80. HOMICIDE—Self-Defense.— Where the court, on a trial for murder, instructs that the burden of excusing the use of a weapon, where self-defense is relied on, is on the prisoner, it should also charge that he may show by any evidence such justifiable necessity. — State v. Cottrill, W. Va., 43 S. E. Rep. 244.

81. HUSBAND AND WIFE—Damages.— In an action by a wife for damages, the amount which her husband paid a physician for his services is admissible to show the condition of the wife. — Oliver v. Columbia, N. & L. R. Co., S. Car., 43 S. E. Rep. 307.

82. HUSBAND AND WIFE — Injury to Wife.—A husband, who nurses his wife while suffering from injuries inflicted by another, cannot recover for loss of salary, but value of services to her. — Southern Ry. Co. v. Crowder, Ala., 33 So. Rep. 335.

83. INDEMNITY — Execution Sale. — The agreement of the execution creditor at the sale to hold a purchaser harmless includes necessary expense of the purchaser in defending the title, where the obligor is requested, but fails, to make such defense. — Cassidy v. Taylor Brewing & Malting Co., 79 N. Y. Supp. 595.

84. INJUNCTION — Repair of Buildings. — Where the officers of a city wrongfully refuse to permit a building, which was lawfully constructed and has been damaged by fire to be repaired, injunction may issue. — City of Roanoke v. Bolling, Va., 43 S. E. Rep. 343.

85. INJUNCTION — Res Judicata. — Mine owner held not entitled, on allegation of *res judicata* by former injunction decree, to obtain temporary injunction. — Montana Ore Purchasing Co. v. Boston & M. Consol. Copper & Silver Min. Co., Mont., 71 Pac. Rep. 403.

86. INSURANCE — Service of Process. — Under a statute providing that foreign insurance companies may be served with process by service on insurance commissioner, a service on the deputy insurance commissioner held insufficient. — Old Wayne Mut. Life Assn. v. Flynn, Ind., 66 N. E. Rep. 57.

87. JUDGMENT — Bill of Particulars. —A bill of particulars will not be ordered in an action for separation, on the ground of cruel and inhuman treatment, where many of the averments relate to the general course of conduct. —Earle v. Earle, 79 N. Y. Supp. 613.

88. JUDGMENT — Motion to Set Aside. — A motion to set aside a judgment within three years from its date is proper, where the petition does not set forth a cause of action.—Kelly v. Strouse, Ga., 43 S. E. Rep. 280.

89. JUDGMENT — Res Judicata.—Decree dismissing suit to, among other things, foreclose a mortgage, held *res judicata* in suit to enjoin sale under the mortgage on the question of no indebtedness. — Wood v. Wood, Ala , 33 So. Rep. 347.

90. JUSTICES OF THE PEACE — Certiorari to Justice. — Where the magistrate's answer to a writ of *certiorari* did not verify the statement in plaintiff's petition as to judgment rendered, or any disposition made of the case, the superior court had no jurisdiction to sustain the *certiorari*.—Garrett v. McIntosh, Ga., 43 S. E. Rep. 260.

91. JUSTICES OF THE PEACE — Title to Land. — Under a declaration in trespass for cutting down plaintiff's growing trees, the title to the land held involved in the action.—Heath v. Robinson, Vt., 53 Atl. Rep. 995.

92. LANDLORD AND TENANT—Forcible Entry.—The fact that under the terms of the lease, and under a mortgage given by a tenant to his landlord, the latter had a right to retake possession, did not justify him in making a possible entry on the premises.—Kerr v. O'Keefe, Cal., 71 Pac. Rep. 447.

93. LANDLORD AND TENANT — Unlawful Detainer.—A party remaining in possession of realty after personal notice that, if he remains, he will be charged a certain rent, becomes liable for the rent, even though he is acting merely as agent and employee of another person, who originally leased the premises. — Nolan v. Hentig, Cal., 71 Pac. Rep. 440.

94. LIBEL AND SLANDER — Punitive Damages. — In an action for libel against a newspaper corporation and the reporter who wrote the libelous article, it is competent, as against the corporation, to prove the ill will or malice of the reporter, for the purpose of recovering punitive damages.—Clifford v. Press Pub. Co., 79 N. Y. Supp. 767.

95. LIFE INSURANCE — Place of Contract. — The parties to a contract of life insurance, completed within a state between a resident thereof and a foreign company authorized to do business therein, cannot evade the effect of a statute declaring a rule of public policy with respect to such contracts made within its jurisdiction by providing in the policy that it shall be governed by the laws of another state. — Albro v. Manhattan Life Ins. Co., U. S. C. C., D. Mass., 119 Fed. Rep. 629.

96. LIFE INSURANCE—Succession of Mother.—The proceeds of a policy of insurance taken out on the life of a mother in favor of her minor daughter formed no part of the succession of the mother. — Succession of Emonot, La., 33 So. Rep. 368.

97. LIFE ESTATES — Taxes.—A life tenant in possession is chargeable with the taxes on the property. — Downey v. Strouse, Va., 43 S. E. Rep. 348.

98. LIMITATION OF ACTIONS—New Promise.—A written acknowledgment, equivalent to a new promise to pay, must contain an unqualified admission of a present subsisting debt which the party is liable to pay. — Kelly v. Strouse, Ga., 43 S. E. Rep. 280.

99. LIMITATION OF ACTIONS — Partial Payments. — Where limitations are pleaded as a defense to a note, evidence of payments alleged to have been indorsed while the note was not barred is admissible. — Ward v. Hoag, 79 N. Y. Supp. 706.

100. LIMITATION OF ACTIONS — Suspension.—An action to have a conveyance decreed to be a mortgage and to determine liens held not a general creditor's bill, tolling limitations. — Gunnell's Admrs. v. Dixon's Admr., Va., 43 S. E. Rep. 340.

101. MANDAMUS — Appointive Officer. — The removal of an appointive officer by the governor will not be reviewed in *mandamus* to compel the officer removed to deliver to the governor the records, etc., of his office.—Hunt v. Ross, Idaho, 71 Pac. Rep. 430.

102. MASTER AND SERVANT — Assumed Risk.—A member of a construction crew held not to assume the risk of the construction train being run with the headlight behind a box car, so that a hand car on the track is not seen.—Barley v. Southern Indiana Ry. Co., Ind., 66 N. E. Rep. 72.

103. MASTER AND SERVANT—Mechanic's Lien.—Mortgagees, made parties in mechanic's lien foreclosure, held not entitled to object to sale because not themselves seeking foreclosure.—Joralman v. McPhee, Colo , 71 Pac. Rep. 419.

104. MASTER AND SERVANT — Negligence.—A servant held not guilty of contributory negligence in not constantly watching certain appliance, though he knew, if it was moved, he would be injured.—Gould Steel Co. v. Richards, Ind., 66 N. E. Rep. 68.

105. MASTER AND SERVANT — Negligence. — A servant does not assume the risk incurred from the negligence of his master, or from the negligence of the master combined with that of the fellow servant.—McGinn v. McCormick, La., 33 So. Rep. 382.

106. MASTER AND SERVANT — Personal Injury. — A master held not liable for injuries caused by improper erection of machinery, causing an injury to employee before the erection was completed.—W. R. Trigg Co. v. Lindsay, Va., 43 S. E. Rep. 349.

107. MECHANIC'S LIENS — Temporary Alterations. — Where, in addition to removable partitions put up by a tenant and not subject to lien, certain permanent repairs were made by the lessee, of which the lessor had no knowledge, no lien existed therefor.—Hanson v. News Publishing Co., Me., 53 Atl. Rep. 990.

108. MINES AND MINERALS — "Surface." — The word "surface," when specifically used as the subject of conveyance, has a definite and certain meaning, and means that portion of the land which is or may be used for agricultural purposes.—Williams v. South Penn Oil Co., Va., 43 S. E. Rep. 214.

109. MORTGAGES — Execution Sale. — A purchaser of land at execution held entitled to redeem from a prior mortgage foreclosure sale, under Code Civ. Proc., § 701, subd. 1, as the successor in interest of the judgment debtor. Pollard v. Harlow, Cal., 71 Pac. Rep. 454.

110. MORTGAGES — Loss of Equity—Widow, conveying to son-in-law by deed operating a mortgage, held not to have lost equity of redemption by recognition of son-in-law as holder of absolute title.—Tuggle v. Berkeley, Va., 43 S. E. Rep. 199.

111. MORTGAGES — Priorities — Mortgagee, whose loan is to be applied in improvement of property, held entitled to priority over prior incumbrancer, releasing and taking subordinate incumbrance, only so far as such application was actually made.—Joralman v. McPhee, Colo., 71 Pac. Rep. 419.

112. MUNICIPAL CORPORATIONS — Acts Ultra Vires.—The fact that a permit issued by a city for the erection of an obstruction in a public street was *ultra vires* held not to excuse the city from liability for personal injuries caused by the giving way of the structure.—City of Richmond v. Smith, Va., 43 S. E. Rep. 345.

113. MUNICIPAL CORPORATIONS—Defective Sidewalk.—A city held not liable for a slight defect in a crosswalk whereby a pedestrian was injured.—Hamilton v. City of Buffalo, N. Y., 65 N. E. Rep. 944.

114. MUNICIPAL CORPORATIONS—Destruction by Mob.—In an action against a city to recover for the destruction of property by a mob, a proclamation or other official acts of the mayor at the time are admissible to show a condition of riot then existing.—City of Chicago v. Pennsylvania Co., U. S. C. C. of App, Seventh Circuit, 119 Fed. Rep. 497.

115. MUNICIPAL CORPORATIONS — Lighting Streets. — That a city had contracted with an electric company to light its streets held no defense to an action for injuries sustained by reason of the streets not being lighted.—Baltimore City v. Beck, Md., 53 Atl. Rep. 976.

116. MUNICIPAL CORPORATIONS—Ordinances. — Municipal ordinances, otherwise valid, may be adopted to take effect upon the happening of a contingent event.—Bradley-Ramsey Lumber Co. v. Perkins, La., 33 So. Rep. 351.

117. MUNICIPAL CORPORATIONS — Private Drains. — Where a city had never assumed control of a culvert on private lands, extended by the city across a street, the city was not liable for damages caused by its obstruction. Robinson v. City of Danville, Va., 43 S. E. Rep. 337.

118. MUNICIPAL CORPORATIONS — Resolution of Council.—Where there is no notice of a resolution for improvements, as required by Rev. St., § 2304, and the resident owner has no notice thereof until the improvement is completed, the assessment on his abutting property will be enjoined.—Joyce v. Barron, Ohio, 65 N. E. Rep. 1001.

119. MUNICIPAL CORPORATIONS — Street Assessment.—Under a notice of intention that granite curbs be laid where not already laid, the abutting property cannot be assessed for the cost of removing the curb and replacing it with a new curb.—City Street Imp. Co. v. Taylor, Cal., 71 Pac. Rep. 446.

120. NEGLIGENCE — Defective Bridge. — It is not necessary, in an action against a private corporation, for injuries caused by defective bridge constructed by it, to allege that plaintiff did not have knowledge of the defective condition of the bridge.—Indiana Natural Gas & Oil Co. v. O Brien, Ind., 65 N. E. Rep. 918.

121. NEGLIGENCE — Right of Action.—The manufacturer and seller of an article is liable for negligence in its manufacture only to the party with whom he contracts, unless it is an article in its nature dangerous and calculated to injure person or property.—Standard Oil Co. v. Murray, U. S. C. C. of App., Seventh Circuit, 119 Fed. Rep. 572.

122. NEW TRIAL—Appeal.—Where the appellee was not present when a motion for new trial was filed, he cannot be presumed to have waived his objection to appellant's failure to file the same in time by his silence.—Dugdale v. Doney, Ind., 65 N. E. Rep. 934.

123. PARTIES—Amendment.—Amendment of complaint in suit against S and B, "doing business as S Bros.," to make it against S Bros., a corporation, held not allowable.—Steiner Bros. v. Stewart, Ala., 33 So. Rep. 343.

124. PARTNERSHIP—Incoming Partner. — An incoming partner held not liable for money previously advanced by testator to a member of the firm, in the absence of an agreement to assume such liability.— *In re* Hoagland's Estate, 79 N. Y. Supp. 1080.

125. PARTNERSHIP — Note. — In an action on a note against an indorser, the use of the proceeds of the note by a firm of which the indorser was a member held not to preclude him from setting up forgery.— Pettyjohn v. National Exch. Bank, Va., 43 S. E. Rep. 203.

126. PATENTS—Infringement. — Officers of a corporation are not liable in equity for infringement of a patent by the corporation, where they are not charged with having participated in the infringement otherwise than as officers of the corporation. — Farmers' Mfg. Co. v. Spruks Mfg. Co., U. S. C. C., E. D., N. Car., 119 Fed. Rep. 594.

127. PRINCIPAL AND AGENT — Authority of Agent. — The authority of an agent cannot be proved by his declarations, not known to or ratified by the alleged principal.—Orange Belt Ry. Co. v. Cox., Fla., 33 So. Rep. 403.

128. PRINCIPAL AND SURETY— Notice of Claim.—Notice of death of employee, given to a surety company, held not notice of a claim against the surety.— Granite Bldg. Co. v. Saville's Admr., Va., 43 S. E. Rep. 351.

129. PUBLIC LANDS — Trespass. — To subject one who unlawfully cuts and removes timber from public lands to liability for the enhanced value given to it by his labor and expense, his trespass must have been willful, with knowledge that he acted without right. — Powers v. United States, U. S. C. C. of App., Sixth Circuit, 119 Fed. Rep. 562.

130. QUIETING TITLE— Bill to Remove Cloud. — A bill to remove a cloud must allege that a complainant is not only the owner, but that he is in possession, or that the land is wild and unoccupied.—Simmons v. Carlton, Fla., 33 So. Rep. 408.

131. QUIETING TITLE—Possession.— Wrongful forcible possession is not such possession as the owner must have in order to maintain a bill to remove a cloud on title.—Hughey v. Winborne, Fla., 33 So. Rep. 249.

132. RAILROADS—Constitutional Law.—Rev. St., §§ 3343-3346, requiring railroad companies to provide drainage ditches, etc., held unconstitutional and void for failure to provide for any notice to the railroad company of proceedings against it. — Chicago & E. R. Co. v. Keith, Ohio, 65 N. E. Rep. 1020.

133. RAILROADS— Negligence.—The running of a train at 50 miles an hour through the outskirts of a city is not, of itself, evidence of wantonness. — Peters v. Southern Ry. Co., Ala., 33 So. Rep. 332.

134. RECEIVERS—Parties.— Parties to an action, whose rights or liabilities were not affected by an order, held not entitled to object that the rights of third persons may be injuriously affected. — La Junta & Lamar Canal Co. v. Hess, Colo., 71 Pac. Rep. 415.

135. RECORD—Arraignment.—Where there is sufficient in the record to show the presence of the accused in court during the proceedings, the omission of a formal arraignment is waived by pleading to the indictment. —Bassett v. State, Fla., 33 So. Rep. 262.

136. RECORD—Pleas in Abatement. — Motion in arrest of judgment from part of the record proper, and, when evidenced to an appellate court only by bill of exceptions, cannot be considered.— Kelly v. State, Fla., 33 So. Rep. 235.

137. REMOVAL OF CAUSES—Waiver of Right.—Where a state court has denied a motion for removal to the federal court, any error in such ruling is not waived by the moving party defending himself in such court after the denial.—Pennsylvania Co. v. Leeman, Ind., 66 N. E. Rep. 48.

138. ROBBERY—Property of Infant.—An indictment for robbery from an infant of wages paid him by his father must allege property in the infant, and not in the father. —Dorsey v. State, Ala., 33 So. Rep. 350.

139. SHERIFFS AND CONSTABLES—False Imprisonment. —In an action against a justice and constable for false imprisonment, where they answer jointly, if the warrant was issued without jurisdiction, the constable cannot claim protection thereunder. — Church v. Pearne, Conn., 53 Atl. Rep. 955.

140. STATES—Legislative Printing. — Form of guaranty attached to proposal for legislative printing held to sufficiently comply with the statute.— People v. McDonough, N. Y., 65 N. E. Rep. 963.

141. STATES—Removal of Officer.— Where the state engineer, an appointive officer, is removed from office, as authorized by Act March 2, 1899, it is his duty to deliver the office room and all property relating to the office to the governor.—Hunt v. Ross, Idaho, 71 Pac. Rep. 480.

142. STREET RAILROADS—Abutting Owners.—The consent of owners of abutting lots to the construction of a street railroad are rights personal to each owner of the abutting lots.—Hamilton, G. & C. Traction Co. v. Parish, Ohio, 65 N. E. Rep. 1011.

143. TAXATION — Sales. — Where a tax sale certificate is ineffectual to transfer title, the sale not being absolutely void, the holder is subrogated to the state's lien for the taxes paid by the sale.—Dixon v. Eikenberry, Ind., 65 N. E. Rep. 938.

144. TAXATION — Tax Sale.—A sale by the state at public auction of property, title to which had vested in the state on a forfeiture for delinquent taxes, is not a tax sale strictly.—Leathem & Smith Lumber Co. v. Nalty, La., 33 So. Rep. 354.

145. TELEGRAPHS AND TELEPHONES — Negligence.—In an action or personal injuries by reason of the negligence of a telephone company in allowing its wire to hang so low on a highway that a horse's feet caught therein, evidence as to the condition of the wire some months subsequent to the time of the injury is inadmissible.—Hannum v. Hill, W. Va., 43 S. E. Rep. 223.

146. TENANCY IN COMMON — Contribution. — Where remainderman in possession pays taxes for life tenant, he cannot call on other remaindermen for contribution.— Downey v. Strouse, Va., 43 S. E. Rep. 349.

147. TRIAL — Affirmative Charge. — The affirmative charge is not to be given where there is any material conflict in the evidence, or it authorizes a reasonable inference of facts unfavorable to recovery by the one asking it. — Peters v. Southern Ry. Co., Ala., 33 So. Rep. 332.

148. TRIAL — Argument of Counsel. — Where argument of opposing counsel is considered improper, held the duty of counsel to call the attention of the court thereto and request it to admonish such counsel. — Dimon v. New York Cent. & H. R. R. Co., N. Y., 66 N. E. Rep. 1.

149. TRIAL — Directing Verdict. — Where a case is *in limine*, and the judge sees that a party is about to prevail who in law is not entitled to prevail, it is not only his right, but duty, of his own motion to give the case such direction as will prevent a result inconsistent with the law.—Kelly v. Strouse, Ga., 43 S. E. Rep. 280.

150. TRIAL — Motion to Exclude Testimony. — Where a witness testifies without a question being asked him, motion to exclude is the proper remedy. — Southern Ry Co. v. Crowder, Ala., 33 So. Rep. 335.

151. TRIAL — Question of Fact — A special finding that plaintiff was not a *bona fide* purchaser of a note for value out took the same subject to any defense affecting the the consideration, is one of fact and not reviewable on appeal as a conclusion of law.—American Nat. Bank v Watkins, U. S. C. C. of App., Seventh Circuit, 119 Fed. Rep 545.

152. TRIAL — Verdict. — A prayer for the direction of a verdict at the close of plaintiff's case is waived by defendant's introduction of evidence on its own behalf.— Western Maryland R. Co. v. State, Md., 53 Atl. Rep. 969.

153. VENDOR AND PURCHASER—Ejectment.—A vendor to recover in ejectment, the purchaser refusing to make payments because plaintiff failed to give stipulated title, held required to restore payments and pay for improvements.—Crouch v. Nast. 79 N. Y. Supp. 1120.

154. WILLS—Construction.—A will naming as residuary legatees "my sister and her daughters and my brother," the sister having two daughters, construed as leaving one-fourth of the residuary estate to each.—*In re* Morrison's Estate, Cal., 71 Pac. Rep. 453.

155. WILLS — Lapsing Devises.—Under Rev. St., § 5971 there is no distinction as to a lapsed devise between the issue of a devisee who died before the making of a will and of one who died after it.—Shumaker v. Pearson, Ohio, 65 N. E. Rep. 1005.

156. WITNESSES — Credibility — Where accused is a witness, he may be asked, on cross examination, how many times he has been before the court, to test his credibility.—State v. Callian, La., 33 So. Rep. 363.

157. WITNESSES — Recognizance.—Under Burns' Rev St. 1901, § 504, a judge before a recognizance was forfeited held a competent witness in an action on such bond.— State v. Hindman, Ind., 65 N. E. Rep. 911.

158. WITNESSES — Husband and Wife. — Under V. S. 1241, where a husband and wife are both legatees in a will, and are joined as proponents on the appeal from its allowance, the fact that the husband is interested does not disqualify the wife to testify in her own behalf.—*In re* Hathaway's Will, Vt., 53 Atl. Rep. 996.